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THE
LAW'S DISPOSAL
OF
A PERSON'S ESTATE

WHO DIES WITHOUT WILL OR TESTAMENT.

TO WHICH IS ADDED,

THE DISPOSAL
OF
A PERSON'S ESTATE

BY WILL AND TESTAMENT.

WITH AN EXPLANATION OF THE MORTMAIN ACT.

BY PETER LOVELASS, GENT.

The Eleventh Edition, with numerous Additions,

BY NIEL GOW,

OF LINCOLN'S-INN, ESQ. BARRISTER AT LAW.

LONDON:

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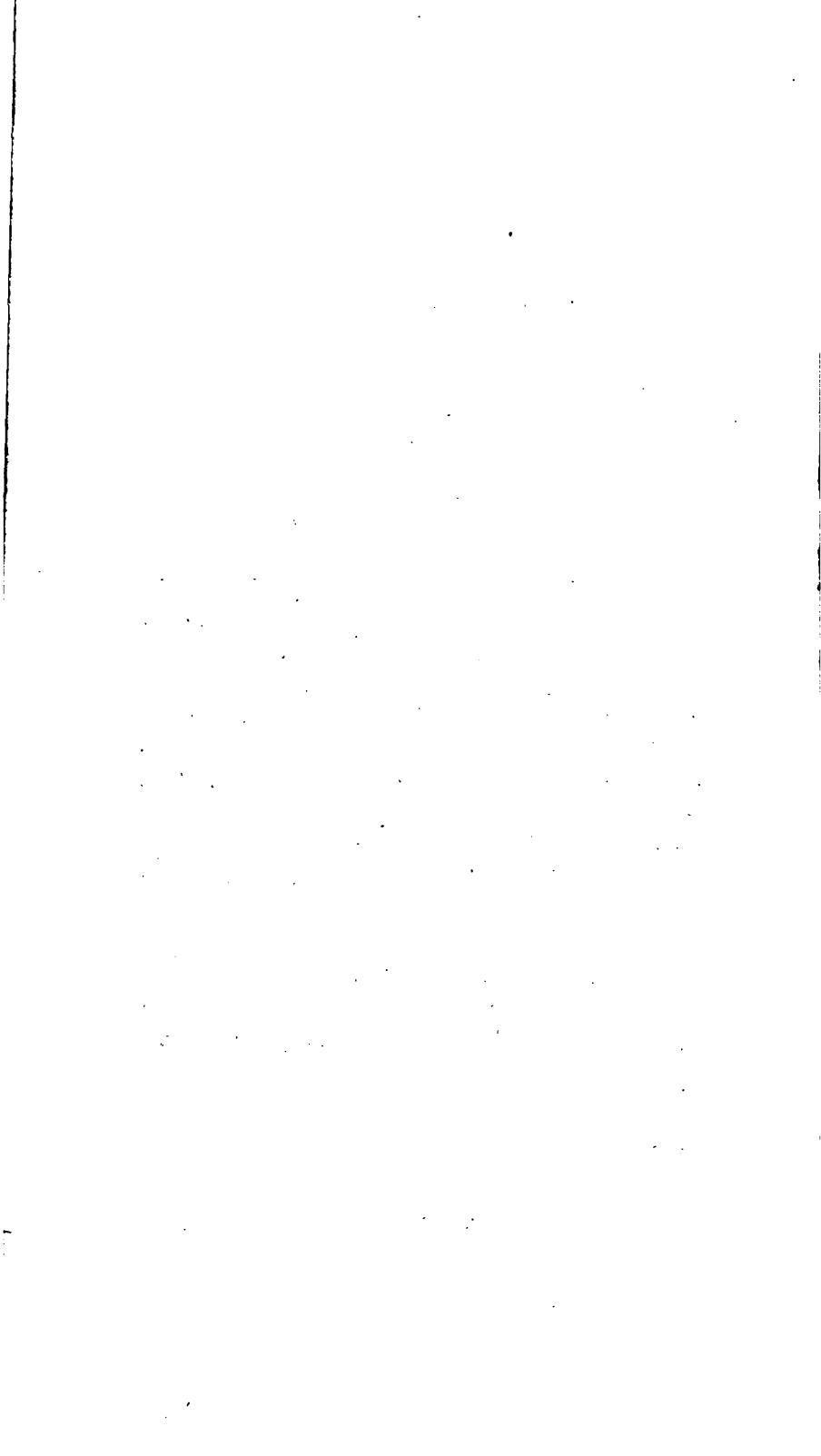
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TO

THE ELEVENTH EDITION.

THE Editor having been induced to undertake the publication of this edition of Mr. Lovell's Work, feels it incumbent upon himself to state, that he has not in any instance altered or interfered with the original text, except by expunging that part of it which imperfectly detailed the expence attendant upon the procuring of probate or letters of administration. The new matter incorporated in this edition, consists of the cases adjudged, both since and previous to the appearance of the last edition; and also of various statutes relating to the subject of the Treatise. These, the Editor has reduced into the form of notes, which are throughout referred to by figures. He has also corrected the Appendix, with reference to the new Stamp Duties, and has added a new and more copious Index.

London,
July 1823.



PREFACE

TO

THE NINTH EDITION.

FROM the number of books which contain the science of our law, and the numerous applications to persons conversant therein, for advice concerning the title to real and personal estate in cases of intestacy; it is indisputably clear that no selection could be made from the venerable pile of law-learning, more immediately useful, than that which relates to the estates of persons dying intestate; and of this the Author being well convinced, was led to select the first part of this Work; to which, since it was published, he has made very considerable additions, and copiously treated on the law relative to wills and testaments; laying down the whole with such clearness and perspicuity, as to render the same perfectly intelligible and easy of comprehension to those unacquainted with the system of our law, or the phrases commonly used by writers thereon.

In the first impression of this Work, entitled, "The Will which the Law makes," &c. care was taken in explaining the different kinds of estates and effects a man might die possessed of, and in what manner the law would operate on failure of his having made any disposition thereof; shewing who would be entitled to the administration of his personal estate, and the method to

be pursued by the administrator for obtaining it; and after the same was obtained, in what manner he should proceed for getting in the deceased's effects, and administering the same by paying debts and distributing the surplus to such as were entitled thereto; likewise to whom the real estate would descend; how far the same might be liable to the ancestor's debts; the title an husband had thereto by the curtesy of England, and a wife with respect to dower. And herein care was also taken to explain the customs of the city of London and province of York, and to shew how those varied from each other, and both of them from the law of the nation in general; in what manner distribution was to be made amongst children, some of whom had been advanced in their parents' lifetime; and the effects of such advancement, both by the customs, and common and statute law.

The reception, and universal approbation, this impression met with from the Public in general, and gentlemen of the profession, incontrovertibly testified its merit very shortly after it came out of press, in March 1785; near fifteen hundred copies thereof being sold in the course of a few months after; and the sale of three other editions, from the 25th of March 1786, to the 23d of January 1788, was an indisputable testimony of its utility, and the addition made thereto, of that part entitled, "The Disposal of a Person's Estate by Will and Testament;" whereon, as well as on the former subjects, very considerable improvements having been made in the seventh and subsequent editions, the work is rendered far more extensively useful than before.

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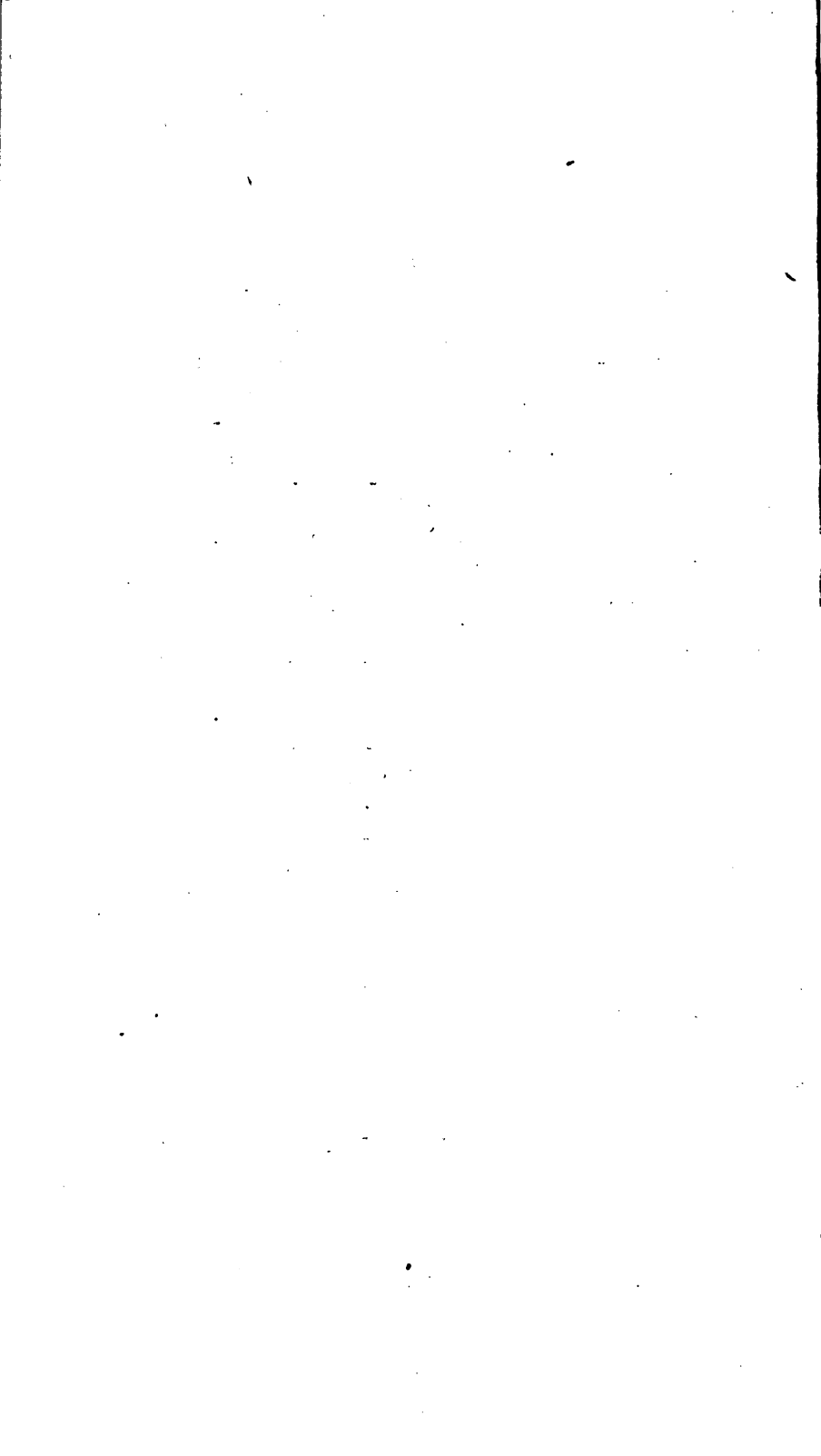
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THE
LAW'S DISPOSAL
OF
A PERSON'S ESTATE,
WHO DIES WITHOUT WILL OR TESTAMENT.

CHAPTER I.

OF INTESTATES.—OF ADMINISTRATION:—WHY IT SHOULD
BE OBTAINED; AND WHO ARE ENTITLED THERETO.—BY
WHOM IT IS TO BE GRANTED.—THE METHOD OF OBTAIN-
ING IT.—HOW THE SAME MAY BE REVOKED.

SECTION I.

Of Intestates.

THERE are divers kinds of intestates. One that makes no will at all; another that makes a will and executors, and they refuse to act: in this case he dies *quasi intestatus*^a; that is, as if intestate. But this latter is not that kind of intestacy here intended: for in this case the law does not dispose of the estate; as here administration is to be granted *cum testamento annexo*, that is, with the testament annexed; and then the duty of the administrator is very little different from that of an executor^b; he being to adhere to the testament, which is to be his guide in disposing of the estate and effects of the deceased. But as the former is that which is here intended, we shall briefly take notice of the distinction Wentworth makes between a will and a

^a 2 Inst. 397.

^b 2 Black. Com. 504.

testament, without entering into a minute discussion of intestacy, which would be somewhat foreign to this subject, and therefore shall be reserved for a subsequent part of the work^c; it being our present design to show how the law disposes of a person's estate in case he dies wholly intestate, and not to point out the various kinds of intestacy. — It is called a will, says Wentworth, when there is an executor appointed; and when there is none, it is termed a testament. So there may be a will where there is no testament, and a testament where there is no will. And where a testament is made without an executor being named, this testament is to be adhered to as a guide to the administrator in disposing of the estate, in the same manner as where one or more executors are named, and they refuse to act^d.

SECTION II.

Of Administration: Why it should be obtained; and who are entitled thereto.

AN administrator cannot act before letters of administration are granted to him; he not being like an executor, who may do many acts before he proves the will; but an administrator may do nothing till letters of administration are issued^e (1). When letters of administration are issued,

^c See post.

^d Went, Off. Exec. 2.

^e 2 Black. Com. 507.

(1) There is a manifest distinction between the case of an administrator and an executor. An administrator derives his title from the Ecclesiastical Court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death. See *Woolley v. Clark*, 5 Barn. & Ald., 745.

the person deputed by the ordinary, that is, he who grants the letters of administration, to administer the intestate's goods, shall have an action to demand and recover, as executor, the debts due to the intestate^f.

If the deceased die wholly intestate, without making either will or testament, then general letters of administration must be granted by the ordinary to such administrator as the statutes of 31 Edw. III. c. 11. and 21 Hen. VIII. c. 5. direct; and in consequence of which the ordinary is compellable to grant administration of the goods and chattels of the wife to the husband, or his representatives^g, that is, his executors or administrators, who, if the husband die before administration taken, will be entitled in equity, and not the wife's next of kin^h. And that the administration of the wife's goods of right appertaineth to her husband, is confirmed by statute of 29 Car. II. c. 3. which enacteth that the statute of the 22 & 23 Car. II. c. 10. (commonly called the Statute of Distributions) shall not extend to the estates of femmes-covert that shall die intestate; but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the sameⁱ (2). But if the wife was executrix to

^f Stat. 31 Edw. III. c. 11.

^g 2 Black. Com. 504.

^h Cro. Car. 106. 1 P. Will. 381.
3 Atk. 526.

ⁱ The husband has seldom occasion for taking administration on the death of his wife, unless it is to recover something that appertained to the wife, which she was not possessed of during the marriage; for immediately on marriage all the chattels

personal she is possessed of vest in her husband, and her chattels real he may make his own if he will. This being the case with respect to the wife's chattels, in order to preserve the same, as well as any real estate she may be possessed of, from misfortunes that may happen to the husband by bankruptcy or otherwise, a settlement is usually made.

(2) In a case which lately came under the consideration of the Prerogative Court, a person claimed administration of the effects of the deceased in the character of her husband; but the nullity of the marriage being established in consequence of her mental incapacity, the court pronounced against the interest of the asserted husband. *Browning v.*

another; then as to the goods which she had in that capacity, administration must be granted to the testator's next of kin ^k.

By the statutes of Edward the Third and Henry the Eighth, before mentioned, the ordinary is compellable to grant administration of the husband's effects to the widow, or next of kin. But he may grant it to both, or either, at his discretion ^l. For, it being moved for a mandamus ^m to the official of the bishop of Gloucester, to commit administration to the widow of an intestate, the court observed, that would be to deprive the ordinary of his election, in granting it to her, or the next of kin; and therefore ordered the mandamus to be taken generally, to grant administration of the goods of the intestate ⁿ.—The ordinary may grant administration, either jointly or separately (3);

^k 3 Salk. 21.

^l 2 Black. Com. 496. 504.

^m Mandamus is a writ whereby a command issues in the king's name, from the court of King's Bench, directed to any person, corporation, or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty. And this writ may be obtained for an infinite number of other purposes. It is grounded on a suggestion by the oath of the party injured of his

own right and the denial of justice.

3 Black. Com. 110. The matter for which this writ is obtained must be laid before the court. 3 New Abr. 528. And as the matter must be laid before the court, it must be in term time, when the court is sitting. The manner of laying it before the court is by counsel, who moves the court on the oath of the injured party; which oath is delivered to him in writing, with his instructions, as previously drawn up by an attorney.

ⁿ Str. 552.

Keane, 2 Phillim. Rep. 69. And the marital right of the husband, as administrator at law, is excluded by a limitation in a settlement to the next of kin of the wife. *Bailey v. Wright*, 18 Ves. 49., S. C. on appeal, 1 Swanst. 39.

(3) Although it is in the breast of the Ecclesiastical Court, where there is a community of persons equally entitled, either to grant a joint or a separate administration; yet *cæteris paribus*, it prefers a sole to a joint administration, because it is infinitely better for the estate. For as administrators must join and be joined in every act, a joint administration would not only be inconvenient to them-

for he may grant several administrations of several parts of the goods of the intestate^o; as where a man died intestate, leaving a wife and a brother, the ordinary had granted administration of some particular debts to the brother, and the residue to the wife. It was agreed by the court that the ordinary might grant administration to the brother, as to part, and to the wife for the rest, in which case neither could complain; since the ordinary need not have granted any part of the administration to the party complaining. But if the intestate leave a bond of 100*l.* the ordinary cannot grant administration of 50*l.* to one person, and 50*l.* to another, because this is an entire thing^p.

As concerning the intestate's next of kin: Among the kindred, those are to be preferred that are nearest in degree to the intestate; but of persons in equal degree, the ordinary may take which he pleases^q (4). The nearness of

^o 1 Roll's Abr. 908.

^q 2 Black. Com. 504.

^p 1 Salk. 36.

selves; but what is of more consequence, it must be inconvenient to those who have demands on the estate, either as creditors or entitled in distribution. *Warwick v. Greville*, 1 Phillim. Rep. 126. See also 2 Phillim. Rep. 249. And that court will, in no case, force a joint administration; because, the concurrence of the administrators being required, there might be a complete contrariety of action, and it would be in the power of one of them to defeat the whole administration. *Bell v. Timiswood*, 2 Phillim. Rep. 22. *Dampier v. Colson*, ib. 55.

(4) Where the next of kin claiming administration stand in an equal degree of relationship to the deceased, and, consequently, none have a legal preference, the selection rests with the discretion of the court; that discretion, however, is not to be arbitrarily or capriciously assumed, but to be a legal discretion, governed by principle and sanctioned by practice; in exercising it, the court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate, and to that of all the persons interested in the distribution of the property. The first duty of the court is, to place it in the hands of that person, who is likely best to convert it to the advantage of those who have

degree shall be reckoned according to the computation of the civil, and not of the canon law^r; and therefore, where there be both parents and children of the deceased, the children are entitled to the administration in preference to the parents, though both are in equal degree of kindred; and on failure of children, the parents are entitled^s. Then follow brothers, grandfathers, uncles, or nephews, (and the females of each class respectively,) and lastly, cousins.—The half blood^t is admitted to the administration as well as the whole, for they are of the kindred of the intestate, and only excluded from inheritances of land. Therefore the brother of the half blood shall exclude the uncle of the whole blood^u, and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion^w. But if there is a brother and a sister of the half blood, and the sister is married, then it must be granted to the brother, and not to her and her husband; be-

^r How the nearness of degree is reckoned according to the Civil Law. See post.

^s 2 Black. Com. 504.

^t Who the half blood are. See post.

^u 2 Black. Com. 505.

^w *Ibid.*

claims, either in paying the creditors, or in making distribution; the primary object being the interest of the property. Where there is no material objection on the one hand, or reasons for preference on the other, the court, in its discretion, puts the administration into the hands of the person with whom the majority of interests are desirous of entrusting the estate. *Budd v. Silver*, 2 Phillim. Rep. 115. And although the wishes of creditors are not in all cases of weight, yet if the estate is considerable, the demands heavy, and the solvency in the slightest degree doubtful, they are entitled to consideration. 1 Phillim. 127. As between brothers and sisters, primogeniture gives no right against the wish of the majority; but if things are precisely equal, if the scale is exactly poised, being the elder brother would incline the balance. *Ib.* 125. And all other circumstances being equal, a man accustomed to business is preferred as an administrator. *Williams v. Wilkins*, 2 Phillim. 100; and so is a solvent person to one who has been a bankrupt. *Bell v. Timiswood*, *ib.* 22.

cause in effect it makes the husband administrator, who is not of kin to the intestate; and if she die, the husband would still continue administrator, and so might possess himself of the whole personal estate^x.

When the right of administration devolves upon an infant, the ordinary is to grant administration till he arrives at the age of twenty-one; because an infant cannot, before his full age, give bond to administer faithfully^y. And as such an administrator is but in nature of a curator for the infant, and has no interest or benefit in the intestate's estate but in right of the infant, it has always been held discretionary in the ordinary to whom to grant it; and therefore it hath been frequently adjudged, that he is not obliged, within the statute of Henry the Eighth, to grant it to the next of kin, either of the deceased or the infant^z.—If none of the kindred will take out administration, a creditor may by custom do it. And the ordinary may, in defect of all these we have here mentioned, commit administration (as he might have done before the statute of Edward the Third, when the ordinary had the absolute disposal of intestates' effects^a) to such a discreet person as he approves of; or may grant him letters *ad colligendum bona defuncti*; that is, to gather up the goods of the deceased, which neither make him executor nor administrator; his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased^b.—If an administrator die, his executors are not administrators; but it behoveth the ordinary to commit a new administration^c. Where the administration is granted to two, and one of them dies, the administration surviveth to him who is living^d.

^x 3 Salk. 21.

^y Godolph. 102. 5 Co. Rep. 29.

^z Hob. 251. 1 New Abr. 381.

When a person having neither wife, child, or kindred, dies intestate, the usual course is for some one to procure letters patent, or other authority from the king; and then the

ordinary of course grants administration to such appointee of the crown.

^a 2 New Abr. 398.

^b Went. Off. Exec. chap. 14.

^c 1 Roll's Abr. 807.

^d Cas. Talb. 127.

SECTION III.

Where, and by whom Administration is to be granted.

GENERALLY the person who is to grant administration is the bishop of the diocese, or his officer, where the intestate dwelled^e. And if all the goods of the deceased lie within the same jurisdiction, an administration granted by him is the only proper one; but if the deceased had *bona notabilia*, or chattels to the value of one hundred shillings, or five pounds, in two distinct dioceses, then administration must be taken out before the metropolitan of the province^f. But if a man die upon a journey, the goods that he then hath about or with him shall not be as *bona notabilia*, to cause administration to be committed in the prerogative^g.— Debts owing to the intestate are *bona notabilia*, as well as goods in possession^h. And they shall be *bona notabilia*, in that diocese where the bond or other specialties be, and not where the debtor inhabitsⁱ. So judgments obtained in the courts at Westminster, upon actions laid in the country, are *bona notabilia*; not where the action was laid, but where the judgment was obtained; because the record is there^k. But if the debts be only by simple contract, without specialty, then they are esteemed *bona notabilia* in the place where the debtor is^l (5). So a bill of exchange shall be said to be

^e Swinb. 427.

^f 2 Black. Com. 509.

^g Swinb. 438, 439. The administration has nothing to do with real estate (a description whereof see in page 86.) And in case lands be given by will to executors for payment of debts or legacies; it seems

this shall not be *bona notabilia*, although it be assets. Went. Off. Exec. 46.

^h 1 Roll's Abr. 909.

ⁱ *Ibid.*

^k Carth. 148.

^l Went. Off. Exec. 46.

(5) In *indebitatus assumpsit*, by an administrator for goods sold and delivered by the intestate, on an administration committed by the archdeacon of *Berkshire*, the defendant pleaded in bar, that he, the defendant, at the time of the death of the intestate, was an inhabitant and resiant

bona notabilia where the debtor is, and not where the bill is: for it is no specialty in law: for if the administrator pays debts upon simple contract, or suffers judgment against him, in such actions he may plead such payment or judgment in bar to an action upon a bill of exchange^m.—Where one dies possessed of goods in London and Dublin, in such case the resolution seems to have been, that the archbishop of Canterbury, by his prerogative, was to grant administration of the goods in London, and the archbishop of Dublin for those in Dublinⁿ. If one die in Ireland, and have nothing but a specialty for money, and that specialty doth lie in England, the ordinary of the diocese, within which the

^m 3 Salk. 164.

ⁿ Gibs. 472. 4 Burn's Eccles. Law, 182.

in the city of *Oxford*, which was within the diocese of *Oxford*, and that the archdeaconry and whole county of *Berks* were within the diocese of *Salisbury*. On special demurrer, because it did not appear that the defendant was not an inhabitant within the diocese of *Salisbury*, the court overruled the demurrer, and adjudged the plea to be good. *Hillyard v. Cox*, Salk. 37. 747. There is evidently a mistake in *Salkeld's* report of this case; and which mistake is noticed by *Lee C. J.*, in *Griffith v. Griffith*, Say. Rep. 83. The same case is to be found in *Lord Raym.* 562, where it is said, that *Northey* took exception to the plea, because the defendant did not traverse his residence in *Berks* within the peculiar. *Holt C. J.* "If the debtor has two houses " in several dioceses, and at the time of the death of the " debtor and commission of administration, is inhabitant and " resident at one of the houses, that will exclude the jurisdiction of the ordinary of the diocese in which the other " house stood." See *Selw, N, P.* 749. In debt by an administrator, it appeared, that the letters of administration were granted by the bishop of *Bristol*. Plea, that the plaintiff's intestate died on the high sea out of the jurisdiction of the bishop of *Bristol*; and that, therefore, the letters of administration were void. On demurrer, it was holden, that the letters of administration were good; for the right of granting them is not founded upon the dying of an intestate within a diocese, but upon his leaving goods therein. *Griffith v. Griffith*, Say. 83.

place is where the specialty lies, shall commit the administration; and if the ordinary of another diocese grant it, the administration is void: and therefore the case was, a merchant in Ireland was bound in an obligation of forty pounds to one J. S. in London, and the obligation was made in Ireland, but remained always in London, and the merchant died intestate in the county of Bedford in England, and a bishop of Ireland did commit the administration to one, and the archbishop of Canterbury committed it to the wife of the intestate, who had the obligation; in this case, the last administration was adjudged good: and it was there held, that the administration shall be granted by the ordinary of the place, where the specialty doth lie at the time of the death of the intestate, and not by the ordinary of the place where the debt began °.

One by will made in England, devises an annuity in trust for his wife out of lands in Ireland; the testator and his wife and the trustees residing in England, the annuity shall be paid in England, and the estate bear the charge of the return. So if one in England gives by will a legacy out of land in Ireland, the legacy shall be paid in England, and in English money^p. So where a charge was made on an Irish estate, but the settlement and will being made in England, and all parties living here, the money was decreed to be paid into court with English interest, and without deducting the charge of the return from Ireland^q.

If a person die intestate having personal property in England and abroad, distribution must be according to the law of that country where he was resident when he died, of which further mention is made hereafter^r.—An intestate died at Jersey, and at the time of his death there was owing him 500*l*. bond debt in London. A bill was brought for a distribution of the 500*l*. according to the statute of Car. II.; and the question was, Whether it shall be distributable according to the laws of England, it being found in the province of Canter-

° Shep. Touch. 443.

^p *Wallis v. Brightwell*, 2 P. Will.

88.

^q *Phipps v. Earl of Anglesea*, 1 P. Will. 696.

^r See post.

bury, or according to the laws of Jersey, where the intestate resided at the time of his death. Held to be distributable according to the laws of Jersey^{*}. So with respect to administration, if a person come from Jamaica, reside and die in England, and administration be granted here, the Judge of Probate in the plantations is bound thereby, and if applied to for administration must grant it to the same person to whom granted here. — One Williams resided and died intestate in England; administration was granted in England to his widow, in Jamaica to his sisters and their husbands. Application by the widow to the judge in Jamaica, for administration, and refused. On appeal to the king in council, the sentence was reversed. Lord Chief Justice Lee, who then attended in council, gave his reasons, that the plantations being within the diocese of London, and subordinate to the prerogative of Canterbury, were therefore bound by the probate of that court: but lord Mansfield has since said, the better and more substantial reason for such determination is the residency[†] (6).

^{*} *Pipon v. Pipon*, Amb. Rep. 25.

[†] *Burn v. Cole alias Allin*, Amb. Rep. 415.

(6) The personal property of an intestate, wherever situated, must be distributed according to the law of the country where his domicil was, and such is *primâ facie* the place of his residence, but that may be rebutted or supported by circumstances; for although the locality of the party's abode at the time of his death determines the rule of distribution, yet it must be a stationary, not an occasional residence, in order that the municipal institutions may attach on the property. *Sir Charles Douglas's case*, 5 Ves. 758. *Brodie v. Barry*, 2 Ves. & Bea. 131. 1 Woodd. 385. In respect to a domicil acquired in the *East Indies*, or in any of the colonial possessions, it is not to be distinguished from an *English* domicil, for those territories and islands are all, in the politic sense of the word, a part of the mother country, and the personal estate of an intestate domiciled in any of them is distributable according to the law of *England*, exactly the same as if the party had resided and died in *England*. In

In case a person has *bona notabilia* both in the province of York and Canterbury, administration must be taken out before both metropolitans, if within the jurisdiction of each there are *bona notabilia* in divers dioceses ; or else if in either of the provinces, the goods lay in one diocese, then administration must be taken out before the particular bishops in

fact, a domicil in *India*, or in any of the colonies, is, in legal effect, a domicil in the province of *Canterbury*, and consequently administration must be granted by the metropolitan of that province. A distinction, however, has been drawn by the House of Lords (and which Lord *Eldon* has characterized as very refined, 2 Jac. & Walk. 546,) between a person, a Scotsman, for instance, who goes out to the *East Indies* in a king's regiment, and dies there in the king's service ; and one of the same nation who goes out, and dies in the service of the *East India Company*. In the former case the original domicil of the party will not be changed, and his effects will be distributable according to the law of Scotland ; but in the latter the *domicilium originis* is abandoned, and a subsequent *Indian* domicil being acquired, distribution of his estate must be made in consonance with the law of England. *Bruce v. Bruce*, 2 Bos. & Pul. 229. n. S. C. 7 Bro. P. C. 230. The distinction seems to be founded on this principle, that a servant of his majesty, like an ambassador, cannot be supposed to take up a permanent residence in, or to go to the country to which he is ordered *animo morandi* ; his change of residence is merely temporary, in obedience to, and in compliance with, the commands he may receive ; and he is liable to be recalled at any period. But a servant of the company goes out with the fixed and settled purpose of remaining there ; he enjoys the privileges of the place ; he may mean to return when he has realized a fortune, but if he dies in the interval, it cannot be maintained that he has not abdicated his original Scottish domicil. See on this subject *Somerville v. Somerville*, 5 Ves. 787. *Bempde v. Johnstone*, 3 Ves. 199. *Munroe v. Douglas*, 5 Madd. 379. In a recent case, where a native of *England* domiciled in *Guernsey*, died intestate, leaving a widow and infant children, and the widow was appointed guardian of the children by the royal court of *Guernsey*, and sold the property of the intestate, and invested the produce in the *English* funds, and afterwards came to *England* with her children, and was domiciled there, a

whose several dioceses the goods are^u. Or if the deceased had goods in the jurisdiction of one metropolitan, lying in divers dioceses, and in the other, but in one diocese; then administration must be taken out before the archbishop who has jurisdiction over the divers dioceses, and before the particular bishop of the diocese^w.—The granting of administration of the goods of every bishop, although he hath not goods but in his own jurisdiction, doth belong to the archbishop^x.

There are certain peculiar ecclesiastical jurisdictions, where, by prescription or composition or other special title, the granting administration of the goods of such as dwell and die within those places, doth appertain to the judge of that peculiar^y.—There is the court of peculiars, which is a branch of, and annexed to the court of arches. It has a jurisdiction over all those parishes dispersed throughout the province of Canterbury, in the midst of other dioceses, which are exempt from the ordinary's jurisdiction, and subject to the metropolitan only^z.—Where one dies possessed of goods in the diocese of an archbishop, and in a peculiar of the same diocese, there shall be several administrations, and the archbishop shall have no prerogative, because the peculiar was first derived out of his jurisdiction^a. But where one dies possessed of goods in several peculiars within the same diocese, in that case administration shall not be granted by the bishop

^u Went. Off. Exc. 46.

^w *Ibid.*

^x 4 Inst. 335.

^y Swinb. 427.

^z 3 Black. Com. 65.

^a Gibson, 472. Cro. Eliz. 719.

question arose on the death of some of the children under age, whether the shares of their property became distributable according to the law of *England* or of *Guernsey*, and it was held that the law of *England* was to govern the succession; the domicile of the children being (according to the opinion of foreign jurists, our own law being silent on the subject) to follow the domicile of the surviving parent, where no fraudulent intention in the removal can be imputed. *Pottinger v. Wightman*, 3 Meriv. 67.

of the diocese, but by the metropolitan; insomuch as they are exempt from ordinary jurisdiction ^b (7).

By the statute 4 Ann. c. 16. sect. 26. The power of granting probates of wills, and letters of administration, of the goods of persons entitled to wages for work done in her majesty's yards and docks, is declared to be in the ordinary of the diocese, or such other persons to whom the ordinary power of probates of wills or granting of administration do belong, where such persons shall die; and the wages due to such persons shall not be taken to be *bona notabilia*, to found the jurisdiction of the prerogative court.

The prerogative is grounded upon this reasonable foundation; that, as bishops were formerly themselves the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes; it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority doth not extend. And it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*, besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make, in such cases, one administration serve for all ^c.

It has been decreed that administrations committed by

^b Gibson, 472. Swinb. 440.

^c 2 Black. Com. 509.

(7) In a late case probate in the court of the archdeacon of *Sudbury*, to whom the bishop granted full power to prove the wills of all persons deceased within the archdeaconry, was held good, the testator having died within the archdeaconry, although he was possessed of a term of years in lands lying within another archdeaconry in the same diocese, on the ground that the appointment of the bishop armed the archdeacon with episcopal authority. *Rex v. Yonge*, 5 Mau. & Selw. 119.

the archbishop, by his prerogative, to one who did not die possessed of goods in divers dioceses, were merely void. But the more current doctrine is, that such administrations are not void, like those granted by a bishop, where there are *bona notabilia*, but only voidable by sentence: because the metropolitan hath jurisdiction over all the dioceses in his province, whereas a bishop can by no means have jurisdiction in another diocese^d (8). — It is said, that if administration be committed in a diocese where there are *bona notabilia*, though such grant be *ipso facto*^e void, yet they do not grant a new administration in the prerogative court, before they have repealed that; and in that case they shall not be prohibited^f.

Thus having treated on where and by whom administration is to be granted, and herewith shown the reasonable foundation upon which the prerogative is founded, and touched upon the doctrine of administration being void when granted by an improper court; we shall now show in what manner persons inadvertently applying for probates of wills, or administrations, are to be treated by the respective officers of spiritual courts when so applied to.

As it hath been the case that many have been by apparitors, both of inferior courts and the courts of the archbishop's prerogative, much distracted, by being diversely called and summoned for probate of wills, or to take administrations of the goods of persons dying intestate, and thereby have been vexed and grieved with many causeless and unnecessary troubles and expenses: by Canon 92 (9). "It is

^d 4 Burn's Eccles. Law, 184.

^e *Ipso facto* void, signifies that it is void without any decree or sentence. As in the case of a parson obtaining two or more preferments in the church with cure not qualified

by dispensation, &c. the first living is void *ipso facto*, viz. without any declaratory sentence, and the patron may present to it. Dyer, 275.

^f 4 Burn's Eccles. Law, 185.

(8) See also *Vere v. Jefferies*, Moor, 145. *Nedham's Case*, 8 Rep. 135. a. 5 Rep. 29. b. acc.

(9) This and the following canon will be found among those made by the clergy in a convocation holden in the

" constituted and appointed, that all chancellors, commis-
 " saries, or officials, or any other exercising ecclesiastical
 " jurisdiction whatsoever, shall, at the first, charge with an
 " oath all persons called or voluntarily appearing before
 " them for the probate of any will, or the administration of
 " any goods, whether they know, or (moved by any special
 " inducement) do firmly believe, that the party deceased
 " (whose testament or goods depend now in question) had,
 " at the time of his or her death, any goods or good debts
 " in any other diocese or dioceses, or peculiar jurisdiction
 " within that province, than in that wherein the said party
 " died, amounting to the value of 5*l*. And if the said per-
 " son cited, or voluntarily appearing before him, shall upon
 " his oath affirm, that he knoweth, or (as aforesaid) firmly be-
 " lieveth, that the said party deceased had goods or good debts
 " in any other diocese or dioceses, or peculiar jurisdiction
 " within the said province, to the value of 5*l*. and parti-
 " cularly specify and declare the same, then shall he pre-
 " sently dismiss him, not presuming to intermeddle with the
 " probate of the will, or to grant administration of the goods
 " of the party so dying intestate. Neither shall he require
 " or exact any other charges of the said parties, more than
 " such only as are due for the citation, and other process
 " had and used against the said parties, upon their further
 " contumacy; but shall openly and plainly declare and
 " profess, that the said cause belongeth to the prerogative
 " of the archbishop of that province; admonishing the party
 " to prove the will, or require administration of the goods,
 " of the court of the said prerogative, and to exhibit before
 " him, the said judge, the probate or administration under
 " the seal of the prerogative, within forty days next fol-
 " lowing. And if any chancellor, commissary, official, or

first year of the reign of king James the First, A. D. 1603.
 They received the royal assent, but were not confirmed by
 parliament. Hence it was holden in *Middleton v. Crofts*, Stra.
 1056, that the canons of 1603 did not *proprio vigore* bind
 the laity. See also 1 Woodd. 48. 1 Hal. H. C. L. 33.n.

“other exercising ecclesiastical jurisdiction whatsoever, or
 “any their register shall offend herein; then let him be
 “*ipso facto* suspended from the execution of his office, not
 “to be absolved or released until he have restored to the
 “party all expences by him laid out contrary to the tenor
 “of the premises; and every such probate of any testament,
 “or administration of goods so granted, shall be held void
 “and frustrate to all effects of the law whatsoever. And it
 “is hereby further charged and enjoined, that the register
 “of every inferior judge do, without difficulty or delay,
 “certify and inform the apparitor of the prerogative court,
 “repairing to him once a month, and no oftener, what exe-
 “cutors or administrators have been by his said judge, for
 “the incompetency of his own jurisdiction, dismissed to the
 “said prerogative court within the month next before; under
 “pain of a month’s suspension from the exercise of his
 “office for every default therein.”

But it is provided that this canon, or any thing therein contained, be not prejudicial to any composition between the archbishop or any bishop or other ordinary, nor to any inferior judge that shall grant any probate of testament or administration of goods to any party that shall *voluntarily* desire it, both out of the said inferior court, and also out of the prerogative. And likewise that if any man die *in itinere*, that is, on a journey, the goods that he hath about him, at that present, shall not cause his testament or administration to be liable unto the prerogative court.

In respect of the prerogative court, by Canon 93., “It
 “is decreed and ordained, that no judge of the archbishop’s
 “prerogative shall cite, or cause to be cited *ex officio**, any
 “person whatsoever to any of the before-mentioned intents,
 “unless he hath knowledge that the party deceased was, at
 “the time of his death, possessed of goods and chattels in

* It is so called from the power a person has, by virtue of an office, to do certain acts without being applied to; as a justice of peace may not only grant surety of the peace

at the complaint or request of any person, but he may demand and take it *ex officio* at discretion, &c. Dalt. 270.

“some other diocese or dioceses, or peculiar jurisdiction within that province, than in that wherein he died, amounting to the value of 5*l.* at the least: and decreed and declared, that whoso hath not goods in divers dioceses to the said sum or value, shall not be accounted to have *bona notabilia*. Always provided, that this clause here, and in the former constitution mentioned, shall not prejudice these dioceses, where, by composition or custom, *bona notabilia* are rated at a greater sum^a. And if any judge of the prerogative court, or any, his surrogate, his register or apparitor, shall cite, or cause any person to be cited into his court, contrary to the tenor of the premises, he shall restore to the party so cited all his costs and charges; and the acts and proceedings in that behalf shall be held void and frustrate. Which expences, if the said judge or register, or apparitor, shall refuse accordingly to pay, he shall be suspended from the exercise of his office, until he yield to the performance thereof.”

What has been said under this head respecting administration, is alike applicable to wills and testaments. For regularly, he that shall have the probate of a will, in case where a man doth make a will; shall have the granting of administration of his goods and chattels in case he dies intestate^b.

SECTION IV.

What the Person applying for Administration, is to do before it is granted.

THE practice is not to issue letters of administration, until after the expiration of fourteen days from the death of the intestate; unless for special cause (as, that the goods would otherwise perish, or the like) the judge shall think

^a The law concerning this matter is, that five pounds is the sum or value of notable goods. But where, by composition or custom in any county, *bona notabilia* are rated at a greater sum, the same is to continue unaltered: as in the diocese of London, it is 10*l.* by composition.
^b Burn's Eccles. Law. 181.
^c Shep. Touch. 443.

fit to decree them sooner. On taking out letters of administration, the administrator takes an oath, which is usually in this form: "You shall swear, that you believe A. B. deceased died without a will; and that you will well and truly administer all and every the goods of the said deceased, and pay his debts, as far as his goods will extend; and that you will exhibit a true, full, and perfect inventory of the said goods of the deceased, and render a true account of your administration into the ——— court of ———, when you shall be thereunto required." You also swear that you are the widow, son, daughter, next of kin or creditor, (*as may be the case*) of the said A. B. and that the whole of the goods, chattels, and credits^c he died possessed of, do not in value exceed the sum of £. "So help you God."

By statute 22 & 23 Car. II. c. 10. *It is enacted, that all ordinaries, as well the judges of the prerogative courts of Canterbury and York, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may, upon their granting and committing of administration of the goods of persons dying intestate, of the person or persons to whom any administration is to be committed take sufficient bond with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, mutatis, mutandis, viz.*

"The condition of this obligation is such, that if the within bounden A. B., administrator of all and singular the goods, chattels, and credits of C. D. deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come to the hands, possession, or knowledge of him the said A. B. or into the hands and possession of any other person or persons for

^c 4 Burn's Eccles. Law, 231.

^d The administration has nothing to do with real estate, as has already been mentioned towards the former part of the preceding section.

" him, and the same, so made, do exhibit, or cause to be
 " exhibited into the registry of ——— court, at or before
 " the ——— day of ——— next ensuing; and the same
 " goods, chattels, and credits, and all other the goods, chat-
 " tels, and credits of the said deceased at the time of his
 " death, which at any time after shall come to the hands or
 " possession of the said A. B. or into the hands and posses-
 " sion of any other person or persons for him, do well and
 " truly administer according to law; and further do make,
 " or cause to be made, a true and just account of his said
 " administration, at or before the ——— day of ———; and all
 " the rest and residue of the said goods, chattels, and cre-
 " dits, which shall be found remaining upon the said ad-
 " ministrator's account, the same being first examined and
 " allowed of by the judge or judges for the time being of the
 " said court, shall deliver and pay unto such person or
 " persons, respectively, as the said judge or judges, by his
 " or their decree or sentence, pursuant to the true intent
 " and meaning of this act, shall limit and appoint; and if it
 " shall hereafter appear that any last will and testament
 " was made by the said deceased, and the executor or exe-
 " cutors therein named do exhibit the same into the said
 " court, making request to have it allowed and approved
 " accordingly, if the said A. B. within bounden, being there-
 " unto required, do render and deliver the said letters of
 " administration (approbation of such testament being first
 " had and made) in the said court; then this obligation to
 " be void, and of none effect, or else to remain in full force
 " and virtue.

This condition, as to the administering truly, according
 to law, is to be intended in bringing in the administrator's
 account, and not in paying the debts of the intestate, and
 therefore a creditor shall not take an assignment of the bond,
 and sue it, and for breach assign non-payment of a debt to
 him, or a devastavit committed by the administrator; for
 that would be endless.— By statute 1 Jac. II. c. 17. sect 6.

No administrator shall be cited into court to render an account of the personal estate of his intestate, otherwise than by an inventory thereof, unless at the instance of some person in behalf of a minor, or having a demand out of such estate as a creditor or next of kin; nor shall be compellable to account before any ordinary or judge empowered by the act of 22 & 23 Car. II. otherwise than as mentioned by this act.—The ecclesiastical court understand no more by an account, than some account in nature of an inventory^f; and the ordinary, after the administrator has exhibited an inventory, cannot compel the administrator to account, but it must be at the instance of the party (as one in behalf of a minor, or one having demand out of the intestate's estate, as a creditor or next of kin); and therefore the inventory and account are, as to the ordinary, the same thing^g.

SECTION V.

How and for what Reason, the Administration may be revoked.

If an administration is granted, and afterwards a will is produced and proved, the administration shall be revoked^h. — The ordinary cannot repeal an administration at his pleasureⁱ. — In the case of Sir George Sands, the father administered to his son, and afterwards a woman pretending to be the son's wife, sued for a repeal; but a prohibition^k was granted, because the ordinary had an election to grant it either to the father or wife, and by granting it to the father, had executed his power^l. But where a feme-covert,

^f For more concerning the inventory, and what may be required of the administrator before administration is granted, see post.

^g 3 Atk. 248.

^h 2 Roll's Abr. 907. See more as to this, post.

ⁱ Swinh. 381.

^k A prohibition, is a writ issuing properly out of the court of king's bench, being the king's prerogative writ; but for the furtherance of

justice, it may now also be had in some cases out of the court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in any inferior court. 2 Black. Com. 112. It is a writ to forbid any court to proceed in any cause there depending, on suggestion that the cognizance thereof belongeth not to the court. Fitzh. Nat. Brev. 39.

^l Raym. 93.

that is, a married woman, died intestate, and the next of kin to her obtained administration, and the husband sued for a repeal, a prohibition was denied; because in this case the ordinary had no power, or election, to grant it to any person but the husband^m.

The rule seems to be, that an administration may be repealed, although not arbitrarily, except where there shall be just cause for so doing; as if the administrator should become lunatic, or the like: of which the temporal courts are to judge. So if the next of kin, at the death of the intestate, happen to be incapable of administering, by reason of attain or excommunication, and the ordinary commits it to another; if he afterwards become capable, the ordinary may repeal the first administration, and commit it to the next of kinⁿ. And the same is much more to be said where the administration was undue *ab initio*, that is, from the beginning, whether as granted to any other than the next of kin, or granted by an incompetent authority, or in an irregular manner, without citing those who ought to have been cited^o.

Where a man died intestate, leaving a wife and a sister, the sister, upon the common oath, that she believed he died intestate, without wife or children, obtained administration. And in a suit to repeal it, as obtained by surprise, it appeared to be the custom of the court, never to grant it to the next of kin, until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held, that the ordinary could not be said to have executed his authority, having never had an opportunity to make the election which the statute 21 Hen. VIII. c. 5. gives him; that it was incident to every court to rectify the mistakes they were led into by misrepresentation of the parties: that if there were no surprise (of which the court below was judge) there ought to be a prohibition, because then the administration will have been duly and regularly

^m 3 Salk. 22.

^o *Ibid.*

ⁿ 4 Burn's Eccles. Law, 236.

granted; but there was a plain surprise, and therefore they denied the prohibition^p.—It is said, that an administration may be repealed, without any sentence of revocation to be given in any spiritual court, or otherwise; as by granting a new administration^q.

Where the administrator, after many goods administered, had his administration revoked, and it was committed to B., who sued the first administrator for goods unduly administered; it was held, that there was no remedy but in *Chancery*. But it is conceived in such a case as this, the second administrator might maintain an action at law against the first, for money had and received, or trover for any goods remaining in his possession^r.

CHAPTER II.

OF THE ADMINISTRATOR.

SECTION I.

His Power by Virtue of the Administration.

HAVING seen who are entitled to the administration, and of whom it is to be obtained; and how it may be revoked; we may now consider the power the administrator has, by having the administration thus granted to him. Somewhat of this we have already seen, as that he cannot act before it is granted to him, and that after it is, he may bring actions, as an executor may.—We have seen also the reason why administration should be thus granted; as that the bishops

^p 4 Burn's Eccles. Law, 237.

^q 1 *Ibid*.

^r Jac. Law Dict. 10 edit. tit. Administrator.

were formerly the administrators of the goods and chattels of persons dying intestate, and this continued to be the case till the statute 31 Edw. III. before mentioned was made*. But now administrators are put upon the same footing with regard to suits, and to accounting, as executors appointed by will†. — Where there be two administrators, and one dies, the administration survives, and doth not cease: it not being like a letter of attorney to two, where by the death of one the authority ceaseth; but is rather an office, and administrators are enabled to bring actions in their own names; they come in the place of executors, and therefore the office survives‡. But if there is but one administrator, and he dies, his executors are not administrators, but it behoves the ordinary to commit a new administration. When an administrator hath judgment, and dies, his executors (as such) may not sue execution of the judgment; for none shall have execution of this judgment but he who shall be subject to the payment of the debts of the first intestate§. — If there be two or more administrators, one of them cannot sell goods, or release debts (1), without the others join-

* 2 Black. Com. 495.

‡ 2 Vern. 514.

† Ibid. 496.

§ 5 Co. Rep. 9.

(1) In Mr. *Selwyn's* Abridgement of the Law of Nisi Prius, (5th ed.) p. 751. is the following note. "In *Willand v. Fenn*, E. 11 G. 2. B.R. MSS. a question arose, whether the release of one administrator would bind his companion? The case was argued in E. 11 G. 2. when the Court, entertaining doubts, directed a second argument. The second argument was heard, Trin. 11 & 12 G. 2. when *Lee C. J.* expressed a strong opinion in favour of the affirmative, observing that it was extremely difficult to form a distinction between executors and administrators upon any reasonable foundation; and that although it had not ever been determined at law that the administration survived, yet having been so determined in equity, in *Adams v. Buckland*, 2 Vern. 514. and by Lord *Talbot* in *Hudson v. Hudson*, he thought those authorities were so

ing; for they have but one authority given them by the bishop over the goods: which authority, being given to many is to be executed by all of them joined together^b. But it is otherwise in respect to co-executors; these being in law but one person, therefore the act of one is the act of them all, and the possession of one is accounted the possession of all^c.

An administrator, by virtue of his administration, hath interest in all the chattels, real and personal, of the intestate, and all the goods and chattels, either in possession or action^d, in like manner as an executor in the goods of the testator deceased. And all those goods and chattels which belonged to the intestate at the time of his death, and which came to the hands of the administrator, shall be *assets*, or sufficient goods and chattels, to make him chargeable to creditors, as executors are to creditors and legatees. But before they come to his hands he is not chargeable^e, as we shall see more of hereafter,^f — An executor or an administrator shall regularly charge others for any debt or duty due to the deceased, as the deceased himself might have done; and the same actions the deceased might have had, the same actions, for the most part, the executor or administrator may have also. But an executor or administrator shall not charge another, or have any action against him for a personal wrong done

^b Lord Bacon's Tracts, 162.
1 Atk. 460.

^c Swinb. 328.

^d For the particulars of these, see post.

^e Wood's Inst. new edit. 339.

^f See post.

“strong, that they ought not to be departed from. The other Judges were inclined to the same opinion, but as the case was new, and of general consequence, they ordered it to be argued again. According to Sir *John Strange*, M. R. in *Jacomb v. Harwood*, 2 Ves. 267. the case was decided in the affirmative after the third argument; but from a MS. note in my possession, it appears to have been compromised before the third argument took place. In Mr. *J. Gundry's* MS. note, 13 Gundr. 33. a. it is said to have been adjudged for defendant; that is, that the release of one administrator did bind his companion.”

to the testator, when the wrong done to his person, or that which is his, is of that nature for which damages only are to be recovered: and therefore an executor or administrator cannot sue another for beating or wounding of the deceased ⁵.

In actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery and slander, the rule is *actio personalis moritur cum persona*, that a personal action dies with the person; and it never shall be revived, either by or against the executors, or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed in their own personal capacity, any manner of wrong or injury (2). But in actions arising *ex contractu*, by breach

⁵ Shep. Touch. 459.

(2) Executors and administrators being the representatives of the temporal property only, that is, the debts and goods of the deceased, but not of their injuries, it seems to follow, that their right of maintaining an action in the cases of a personal wrong arising out of the breach of an express or implied contract, depends upon whether there has been an injury to the personal estate of the testator or intestate, or whether the damage consisted only in previous personal suffering. In the latter case, where the injury affects the life or health of the deceased merely, as if it arise out of the unskilfulness of a medical practitioner, or the cause of complaint be the imprisonment of the party brought about by the negligence of his attorney; these, although breaches of the implied promise, by the persons employed to exhibit a proper portion of skill and attention, cannot be made the foundation of an action by a personal representative. So in the case of a personal wrong arising out of the breach of an express contract, as a promise of marriage, an action will not lie by an administrator, unless the intestate had actually been damnified in her property by reason of the breach of the contract. *Chamberlain v. Williamson*, 2 Mau. & Selw. 408. But if the wrongs have operated to the temporal injury of the personal estate; as, for example, if, in the instance last cited, the loss of marriage occasioned a strict pecuniary detriment

of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by, the executors or administrators; being indeed rather actions against the property, than the person, in which the executors, or administrators, have now the same interest that the testator or intestate had before^h.

By the statute 31 Edw. III. before mentioned, administrators shall have an action to demand and recover, as executors, the debts due to the intestate. So if a man take from the executor or administrator the goods of the deceased, for this they must bring their action at common law; for they cannot sue for the goods of the deceased in a court ecclesiasticalⁱ. And tenants may be sued at the common law by executors or administrators for rent behind, and due to the testator or intestate in his lifetime, or at the time of his death; and they may for the same distrain the land charged with the rent^k; and where the testator or intestate is tenant for life only, his executors or administrators may have an action at law for rent that did not become due till

^h 3 Black. Com. 302.

^k Swinb. 18.

ⁱ Swinb. 18. 10 Mod. 21.

to the intestate, then, in respect to that detriment, the administrator would have become legally privy to the injury, and an action bottomed on the promise would have been sustainable by him. *Id. ibid.* In like manner, if a person contracts with a coach proprietor to be safely and securely carried from one place to another, and through the negligence of the servant of such proprietor the coach be overturned, in consequence of which the passenger so contracting dislocates or fractures a limb, and owing to his confinement in procuring a cure, his personal property sustains an injury; although he, during his life, might sue the proprietor in assumpsit or tort, still his representative may, after his death, maintain an action on the contract to carry him safely, and recover damages for the injury which has accrued to his estate from the breach thereof. *Knights v. Quarles*, 4 B. Moore, 541.

the death of such testator or intestate, as will be shewn after we have pointed out some particular rents that, being due to the testator or intestate in his lifetime, may be obtained by the executors or administrators, by action at law or distress.

By the statute 32 Hen. VIII. c. 37. sect. 1. after reciting that by the order of the common law, the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of rent-services, rent-charges, rent-secks, and fee-farms, had no remedy to recover such arrears of the said rents or fee-farms as were due unto the testators in their lives, nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease: it is enacted, that the executors or administrators of tenants in fee-simple, tenants in fee-tail, and tenants for term of life, of rents-services, rent-charges, rent-secks, and fee-farms, unto whom any such rent or fee-farm be due, shall have an action of debt for such arrears against the tenants who ought to have paid in the lifetime of their testator, or against their executors or administrators; or may distrain for the arrears on the land, or other hereditaments chargeable therewith (3), so long as the lands, or other hereditaments, continue in the seisin or possession of the tenant in demesne; who ought immediately to have paid the rent or fee-farm, or the seisin or possession of any other person claiming only from the same tenant, by purchase, gift, or descent, in like manner as their testator might have done.

Tenants in fee-simple, fee-tail, or for term of life, are those who hold any messuages, lands, or tenements, in fee-simple, fee-tail, or for term of life¹; and as they may hold

¹ 2 Black. Com. 59.

(3) In avowing for rent under this statute, it has been held, that the avowant need not set out the title of the testator or intestate, nor shew that he was entitled to distrain. *Meriton v. Gilbee*, 2 B. Moore, 48. *Martin v. Burton*, 3 B. Moore, 608. See also *Lingham v. Warren*, 4 B. Moore, 409.

any messuages, lands, or tenements, in this manner, so they may rent-service, rent-charge, rent-seck, and fee-farm or fee-farm rent; which are called incorporeal hereditaments, as being a right issuing out of a thing corporate, though not the thing itself, but something collateral thereto, which may be lands or houses^m. *Rent-service* is so called, because it hath some corporeal service incident to it, as at the least fealty, or the feudal oath of fidelity. For, if a tenant holds his land by fealty, and ten shillings rent; or by service of plowing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent serviceⁿ. A *rent charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his whole estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be *arrear*, or behind, it shall be lawful to distrain for the same. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed: and therefore it is called a *rent-charge*; because in this manner the land is charged with a distress for the payment of it^o. *Rent-seck*, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress^p. A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of the reservation: for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple, instead of the usual method for life or years^q.

The word *demesne*, or as it is sometimes called, *demeine*, or *demain*, is oft-times used for a distinction between those lands that the lord of the manor hath in his own hands, or

^m 2 Black. Com. 20.

ⁿ *Ibid.* 42.

^o *Ibid.*

^p *Ibid.*

^q *Ibid.* 43. The learned author of the Notes on Co. Litt. says, the

true meaning of *fee-farm*, is a perpetual farm or rent; the name being founded on the perpetuity of the rent or service; not on the *quantum*. Co. Litt. 144. Note 5, 13 Edit.

in the hands of his lessee, demised at a rack-rent, and such other lands appertaining to the manor which belong to free or copy-holders. *But the tenant in demesne* before mentioned; signifies the person seized or possessed of the inheritance.

By SECT. 2. of the statute last mentioned, it is provided, that the same shall not extend to any manor or lordship in Wales, whereof the inhabitants have used to pay to every lord or owner thereof, at his first entry into the same, any sum for the redemption and discharge of all duties and penalties, wherewith the inhabitants were chargeable to any of the lord's ancestors.

SECT. 3. If any man shall have, in right of his wife, any estate in fee-simple, fee-tail, or for term of life, in any rents or fee-farms, and the same to be due and unpaid in the wife's life; the husband, after the death of his wife, his executors and administrators, shall have action of debt for the arrears, or may distrain for the same, as he might have done if his wife had been living.

SECT. 4. If any person shall have any rents or fee-farms, for term of life of any other person, and the same be due and unpaid in the life of such other person, and he die; he to whom the same was due, his executors or administrators, may have an action of debt against the tenant *in demesne*, who ought to have paid the same when it was first due, his executors and administrators; or may distrain for the same upon such lands and tenements out of which the said rents or fee-farms were issuing and payable; in like manner and form as he might have done, if such person, by whose death the aforesaid estate in the said rents and fee-farms was determined and expired, had been in full life.

Hence we may perceive that executors and administrators, by action at law, or distress, are enabled to obtain rent which was due to their testator or intestate; and as to persons who hold estates for term of life only, usually termed tenants for life, the executors and administrators of whom are now enabled to recover, by an action at law, rent which did not become due in the lifetime of their testator or in-

testate; and as concerning those tenants for life, mention having lately been made, and in different parts of this work divers of them described, whereto we shall refer for a further description of them^r; here we may observe that lessees of tenants for life, before the making of the statute we are about to mention, had at the common law a most unreasonable advantage; for, at the death of the lessors, these under-tenants, the lessees, might if they pleased quit the premises and pay no rent to any body for the occupation of the land since the last quarter day, or other day assigned for payment of rent^s. To remedy which by statute 11 Geo. II. c. 19. (wherein it being recited, that where any lessor, or landlord having only an estate for life, in lands, tenements, or hereditaments demised, happened to die before or on the day on which any rent was reserved or made payable, such rent, or any part thereof, was not by law recoverable by the executors or administrators of such lessor or landlord: nor was the person in reversion entitled thereunto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life; of which advantage had been often taken by the under-tenants, who thereby avoided paying any thing for the same); it is enacted, that where any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable, upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of such tenant for life, that the executors or administrators of such tenant for life; shall, in an action upon the case, recover of such tenant or under-tenants of such lands, tenements or hereditaments: if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due, making all just allowances.

^r Tenants for life are those who hold any messuages, lands or tenements, for term of life. Those may be created by deed or grant. And

tenants by the curtesy of England and tenants in dower may be termed tenants for life.

^s 10 Co. Rep. 127.

To the end that a due regard be had to creditors, by the statute 22 & 23 Car. II. c. 10. called the Statute of Distributions, as was mentioned in the second section of the foregoing chapter; it is enacted, that no distribution of the goods of any person dying intestate be made, till after one year be fully expired after the intestate's death. — An administrator, as well as an executor, is allowed, among debts of equal degree, to pay himself first, by retaining in his hands so much as his debt amounts to. So if a person indebted to another, make his creditor or debtee executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to retain so much as will pay himself, before any other creditors whose debts were of equal degree. This is a remedy by mere act of law, and grounded upon this reason; that the executor cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity: but having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in a worse condition than all the rest of the world besides; for, as he can commence no suit, he must be paid the last of any, and of course must lose his debt in case the estate of the testator should prove insolvent, unless he be allowed to retain it. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation, as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion^t (4). The

^t 3 Black. Com. 18.

(4) If two persons be jointly and severally bound in an obligation, and one of them appoint the executrix of the

power the administrator has, in favouring and preferring creditors in the course of paying debts, will be seen hereafter^u; together with some other powers he has vested in him.

SECTION II.

The Particulars of what the Administrator is interested in by virtue of his Administration.

HAVING shewn that the administrator, by virtue of his administration, hath interest in all the chattels, real and personal, of the intestate, and all the goods and chattels either in possession or action; we come now to consider what these are in particular.

^u See post.

obligee his executrix, and die leaving assets, she is not compelled to resort to an action against the survivor, but is entitled to retain for the debt. Com. Dig. tit. Administration, c. i. Hob. 10. 3 Bac. Abr. 10. 2 Lev. 73. So if A. be indebted to B. and C. by several bonds, and die, and D. take out administration to A. and afterwards B. die, having appointed D. his executor, he may retain effects of which he is possessed as administrator of A. to satisfy the debt due to him as executor of B. 11 Vin. Abr. 261. 2 Brownl. 50. And if administration granted to a creditor, be afterwards repealed, at the suit of the next of kin, such creditor may retain against the rightful administrator. 11 Vin. Abr. 265. 1 Salk. 38. In an old case the court inclined to think, that an administrator might plead to an action of debt or bond, a retainer in satisfaction of a bond conditioned for the payment of money to *trustees* for the use of the administrator. *Rockelly v. Godolphin*, 2 Show, 403. S. C. T. Raym. 483. However the right of retainer is only admitted at law in cases in which the debt either is or has been a legally existing debt, for if it be a mere equitable debt, a court of law will not, in respect of it, permit the right to be exercised. *De Tastet v. Shaw*, 1 Barn. & Ald. 664. An executor is allowed in equity to retain for his whole debt as against other creditors of the same degree. *Musson v. May*, 3 Ves. & Bea. 194.

Chattels comprehend all goods, moveable and immoveable; except such as are in the nature of freehold or parcel of it, and this word by the common law extends to all moveable and immoveable goods. But estates of inheritance¹, or freehold², cannot by the common law be termed goods and chattels. *Chattels* are either personal or real. *Personal*, as household stuff, goods and wares in a shop; carts, ploughs, horses, oxen, sheep and the like; and these are called personal in two respects; one because they belong immediately to the person of a man; the other, for that being any way injuriously withheld from him, he hath no other remedy to recover them but by personal action. *Chattels-real*, are such as either appertain, not immediately to the person, but to some other thing by way of dependency; as a box with charters of land, or such as are issuing out of some immoveable thing; as a lease, or rent for a term of years: and chattels-real concern the reality, lands and tenements, interests in advowsons in statutes merchant, and the like³. But fishes in a pond, conies in a warren, deer in a park, pigeons in a dove-house, where the testator, or *intestate* had the inheritance, or but for life, in the pond, warren, park, and dove-house, are not chattels at all, nor go to the executor or *administrator*; but to the heir with the inheritance: and therefore they are not to be put into the inventory of the goods and chattels of the party deceased. But if the testator or *intestate* have any tame pigeons, deer, rabbits, pheasants, or partridges, they shall go to the executors or *administrators*; and though they were not tame, yet if they

¹ For the particulars concerning estates of inheritance, see post.

² Estates of freehold are either of inheritance or not of inheritance, and these not of inheritance are but for life only. Estates of freehold, not of inheritance, may be created by deed or grant; as where a lease is made of lands or tenements to a man to hold for the term of his own life or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for

life; only when he holds the estate by the life of another, he is usually called tenant *pur autre vie*. 2 Black. Com. 104. 120. A lease for 99 years, determinable upon a life or lives, is not a lease for life to make a freehold; but a lease for years, or chattel determinable upon life or lives; and an estate for 1000 years is not a freehold, or of so high a nature as an estate for life. Co. Litt. 46.

³ Co. Litt. 118.

were kept alive in any room, cage, or such like place: so fish in a trunk; also young pigeons, though not tame, being in the dove-house, and not able to fly out^b. Also hounds, greyhounds, spaniels, and the like, as they may be valuable, and may serve not only for delight, but for profit, shall go to the executors or administrators^c. And they shall have all leases for years, though they may be for 1000 years^d, and all lands extended on any judgment, statute, or recognizance, and all arrears of rent due at the death of the testator, or intestate^e, the latter being treated on in the preceding section. Likewise securities for money belong to executors and administrators^f. And they shall have all estates *pur auter vie*, that is, estates held during the life of another, as before mentioned. These being distributable by the statute 14 Geo. II. c. 20, shall, where a man dies intestate, and they were not made to him and his heirs, be distributed in the same manner as his personal estate; but it is otherwise if made to the intestate and his heirs.

Corn sown will also go the executor or administrator, and not to the heir, so also will hops, though not sown, if planted, and saffron and hemp^g. This being what is usually styled emblements, the doctrine of which extends not only to corn sown, but to roots planted, or other annual artificial profit^h, as clover, saint-foin, and the like, which was sown by the deceasedⁱ. But it is otherwise of fruit-trees, grass, and the like; which are not planted annually at the expence and labour of the tenant, but are either the permanent or natural profit of the earth^k. So these latter go to the heir, and not to the executor or administrator. And Mr. Wentworth thinks,

^b 4 Burn's Eccles. Law, 240.

^c *Ibid.*

^d Fitz. Nat. Brev. 120.—An executor or administrator, having a lease, which was granted to the testator or intestate, should attend to the covenants and provisoes contained therein; for if a lease contain a proviso that the lessee and his administrators shall not *set, let, or assign over*, the whole or part of the pre-

mises without leave in *writing*, on pain of forfeiting the lease, the administratrix of the lessee cannot underlet without incurring a forfeiture.

^e 4 Burn's Eccles. Law, 242. Law of Test. 341.

^f 3 Bro. Cha. Rep. 80.

^g 4 Burn's Eccles. Law, 242.

^h 2 Black. Com. 123.

ⁱ 4 Burn's Eccles. Law, 242.

^k 2 Black. Com. 123.

that roots in gardens, as carrots, parsnips, turnips, skirrets, and such like, (which he says may be of value in gardens about London, and some great towns,) shall not go to the executor, but to the heir, because they cannot be taken without digging and breaking the soil¹. But it seems very clear by Lord Coke^m, and Sir William Blackstoneⁿ, that these shall go to the executor or administrator, and not to the heir.

If a man seised for life, or in fee, or tail, in his own right, or in the right of his wife, and sows the ground with corn, but dies before it is ripe, his executors or *administrators* shall have it, and not the wife or heir: but grass ready to be cut for hay, apples, pears, and other fruit on the trees, shall not go to the executors or *administrators*. And the reason of the difference is, because the former comes not merely from the soil, without the industry or manurance of man, as the latter doth. And if the wife had a lease for years, as executrix, and the husband sows the ground with corn, and dies before it is ripe, the corn shall go to his executors or *administrators*, or at least, so much as is more than the yearly rent of the land: but if the husband and wife were the joint tenants of the land, she shall have the corn, and not his executors. And if a parson sows his glebe land, and dies before severance, and after his successor is admitted, instituted, and inducted, before the corn is cut, it shall go to the executors or *administrators* of the deceased, who must pay the tithes thereof, to the successor ^p.(5).

¹ Went. Off. Exec. 62.

^m Co. Litt. 55.

ⁿ 2 Com. 122.

^o Law of Test. 342.

^p 4 Burn's Eccles. Law, 243.

(5) The general rule of law applicable to cases of this description is, that where a tenant of land has an uncertain interest, which is determined either by the act of God or the act of another, there he shall have emblements; but that is not so when the tenancy is determined by his own act. That is laid down in a variety of instances, which will be found in Comyn's Digest, Tit. Biens, G. 2. As where the lessee surrenders, or a woman who is tenant *durante viduitate* mar-

Things that are affixed to the tenement, and are made parcel of the freehold, belong to the heir, and not to the executor or administrator; as the glass annexed to the windows of the house, which is parcel of the house, and shall descend as parcel of the inheritance to the heir, and the executors or administrators shall not have it. And although the lessee himself, at his own cost, cause the glass to be put into the windows, yet, the same being parcel of the house, he cannot take it away afterwards, without danger of punishment for waste. Neither is there any material difference in law, whether the glass was annexed to the window with nails, or in any other manner, either by the lord or by the tenant; for being once affixed to the freehold, the same cannot be removed by the lessee, but shall belong to the heir, and not to the executors or administrators⁹. So in respect to wainscot, this being annexed unto the house, either by the lessor or by the lessee, is parcel of the house. And there is no difference whether it be affixed with great nails or little nails, or by screws or irons thrust through the posts or walls of the house; for howsoever it be affixed, either in manner aforesaid, or in any other manner, it is parcel of the freehold; and if the executors or administrators shall remove it, they are punishable for the same⁹: and not only glass and wainscot, but any other such like thing affixed to the freehold, or to the ground, with mortar and stone; as tables dormant, leads, mangers, and such like; these also belong to the heir, and not to the executor or administrator^r. As do also mill-stones,

⁹ Swinb. 421.

^r *Ibid.*

ries, or the estate determines by forfeiture, condition broken, &c. In all these cases they are not entitled to emblements. See also Co. Litt. 55. b.; and on the same principle a parson, who resigns his living, is not entitled to emblements. *Bulwer v. Bulwer*, 2 Barn. & Ald. 470.

anvils, doors, keys, window-shutters; none of these being chattels, but parcels of the freehold, or thereto pertaining, shall not go to the executors¹ or administrators.

An executor taking away a furnace which was set up in the middle of a house, and not fixed to any wall, the heir brought an action of trespass against him, and it was adjudged for the heir, that this should go as part of the freehold and inheritance to the heir. But in the case of *Day* and *Austin*, Walmsley said, that Lord Dyer's opinion was, that where the furnace is not affixed to the wall the lessee might within his term, take it away; but not if it was fixed to the wall, for there it would strengthen the house". — Pictures and glasses, though, generally speaking, not part of the freehold, yet if put up instead of wainscot, or where otherwise wainscot would have been put up, shall go to the heir; for the house ought not to come to the heir maimed or disfigured². But in the case of *Harvey* and *Harvey*, M. 14. Geo. II. in trover by the executor against the heir, it was held by chief justice Lee, that hangings, tapestry, and iron backs to chimneys, belonged to the executor; who recovered accordingly against the heir. And the law seems now to be held not so strict as formerly; and if these things can be taken away without prejudice to the fabric of the house, it seems that the executor or administrator shall have them; as tables, although fastened to the floor; furnaces, if not made part of the wall, grates, iron ovens, jacks, clock-cases, and such like, although fixed to the freehold by nails or otherwise³.

In the case of *Lawton* and *Lawton*, 1743, the question was, whether a fire-engine, set up for the benefit of a colliery by a tenant for life, shall be considered as personal estate, and go to the executor; or fixed to the freehold, and go to a remainder man⁴. For the plaintiff (who was a cre-

¹ Went. Off. Exec. 61.

² Law of Test. 342.

³ *Ibid.*

⁴ 4 Burn's Eccles. Law, 244.

² A remainder man, is he who has the estate by virtue of some limitation, made either by will or deed, As if a man seised in fee sim-

diter of the tenant for life) evidence was read, to prove that the fire-engine was worth, to be sold, 350*l*. and that it is customary to remove fire-engines. And it was urged, that the testator had died greatly in debt; and it would be hard, when he had been laying out his creditor's money in erecting this engine, that they should not have the benefit of it, but that the strict rule of law should take place. And it was compared to the case of a cyder-mill, which is let in very deep into the ground, and is certainly fixed to the freehold; and yet lord chief baron Comyns, at the assizes at Worcester, upon an action of trover brought by an executor against the heir, was of opinion, that it was personal estate, and directed the jury to find for the executor. And lord chancellor Hardwicke, on the question of the fire-engine, whether it should be considered as personal estate, and consequently applied to the increase of assets for payment of debts, says, it appears in evidence, that in its own nature it is a personal moveable chattel, taken either in part or in gross before it is put up. But then it is insisted, that fixing it, in order to make it work, is properly an annexation to the freehold. In the old cases they go a great way upon the annexation to the freehold; and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time, the general grounds the courts have gone upon of relaxing this strict construction of law is, that it is for the benefit of the public, to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry the Seventh's time, as removing wainscot fixed only by screws, and marble chimney-pieces, is now allowed to be done. Coppers, and all sorts of brewing vessels, cannot possibly be used, without being

ple deviseth or granteth lands to A. for life, and after the determination of A.'s estate for life, limiteth it to B. and his heirs for ever. Here A. is a tenant for life, and B. a remain-

der man in fee; further mention whereof is made in the appendix to this work. See Remainders and Reversions, in the Index.

as much fixed as fire-engines; and in brew-houses especially, pipes must be laid through the walls, and supported by walls: and yet, notwithstanding this, as they are laid for convenience of trade, landlords will not be allowed to retain them. The old rules of law have been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder man. But even in these cases, it admits the consideration of public conveniency for determining the question; and after making some more observations on the case, Lord Hardwicke says, upon the whole, I think this fire-engine ought to be considered as part of the personal estate of Mr. Lawton, and go to the executor for increase of assets. And decreed accordingly^a (6).

There are some goods and personal chattels called heir-looms, which, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor or administrator of the last proprietor; and these are generally such things as cannot be taken away without damaging or dismembering the freehold^b.—If a man be seised of a house, and possessed of divers heir-looms, that by custom have gone with the house from heir to heir; it seemeth that these, although no part of the freehold, shall go to the heir, and not to the executor^c; and that if a man deviseth these away by his will, this devise is void^d.—By special custom in some places, carriages, utensils, and other household impléments, may be heir-looms; but such custom must be strictly proved^e.—Other personal chattels there are, which descend to the heir in nature of heir-looms, as a monument or tombstone in a church, or the coat-armour of his ancestor there hung up, with the pennons and other en-

^a 3 Atkyns, 13. ⁴ Burn's Ec-
cles. Law, 244.

^b 2 Black. Com. 427.

^c 4 Burn's Eccles. Law, 247.

^d Co. Litt. 185.

^e 2 Black. Com. 428.

(6) See also *Elwes v. Maw*, 3 East. 38. *Buckland v. But-terfield*, 4 B. Moore, 440. S.C. 2 Brod. & Bing. 54.

signs of honour suited to his degree (7). In this case, although the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson, or any other, take them away or deface them, without being liable to an action from the heir. Pews in the church are somewhat of the same nature, which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir. But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig or disturb it; and if any one, in taking up a dead body, steals the shroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral^f.

If chattels are bequeathed to go as heir-looms, due attention is necessary to be had to the rules of law concerning limitations of chattels, mentioned in a subsequent part of this work.

Charters and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heir-looms, and shall not go to the executor or administrator^g (8). But as to the chests, *Rolle* makes a dis-

^f 2 Black. Com. 428.

^g *Ibid.*

(7) And a court of equity will order an inspection of articles claimed by the plaintiff, as heir-looms in a chest at the bankers of the defendant, who insists by his answer that he has a lien on the contents of the chest. *Earl of Macclesfield v. Davis*, 3 Ves. & Bea. 16.

(8) Where a bill was filed in Chancery for an antique horn with an ancient inscription, on the ground that it had immemorially gone with the plaintiff's estate, and had been

inction, and saith, if the writings which concern the inheritance are in the chest, the executor shall have the chest, and the heir the writings. But if the chest be shut, the heir shall have the chest also ; if it be not shut, the executor shall have the chest ^h. The author of the Law of Testaments observes, that this distinction seemeth not to be well taken ; for if it be a box intended for the keeping of the deeds, the heir ought to have it, whether locked or open : on the other hand, if it be a box designed for other use, as for keeping linen, it cannot be said to be appurtenant to evidences, although some be in it, for so may other things also ; or perhaps it may be a chest or cabinet of great value, and this, he says, surely shall not go to the heir, when perhaps there is not personal estate sufficient to pay the testator's debts ⁱ.

Besides these things that are in the nature of heir-looms, there are some other goods and personal chattels that may not go to the executors or administrators ; as *paraphernalia*, which our law uses to signify the apparel and ornaments of the wife, suitable to her rank and degree ; and which she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferable to all other representatives, and the jewels of a peeress usually worn by her, have been held to be *paraphernalia*. And the husband cannot by will devise from his wife such ornaments and jewels ; though during his life, perhaps, he hath the power (if unkindly inclined to exert it) to sell them or give them away. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons, except creditors, where

^h 1 Roll's Abr. 915.

ⁱ Law of Test. 343.

delivered to his ancestors by which to hold the land, the court was of opinion that if the land was of the tenure called Cornage, the heir had a title to this monument of antiquity at law. 1 Vern. 273. Harg. Co.Litt. 107.

there is a deficiency of assets (9). And her necessary apparel is protected even against the claim of creditors^k. But she shall not have excessive apparel; and if she takes more than is convenient, she shall be taken to be an executor of her own wrong. If the husband delivers his wife a piece of silk to make a garment, and dies, although it was not made into a garment in the life of the husband; yet the wife shall have it, and not the executors of the husband; but against the debtee of the husband, the wife shall have no more apparel than is convenient^l.—Where the question to be decided was, whether *paraphernalia* should be liable to the payment of simple contract creditors and legacies, Lord Hardwicke said, at law, where the husband dies indebted, the widow cannot have her *paraphernalia*; but this court^m does not determine so strictly; for if the personal estate hath been exhausted in payment to specialty creditorsⁿ, she shall stand in their place, as to so much of the real assets^o of the heir at law; for she has a prior right, and a superior one to legatees, who take only by the bounty of the testator^p. So likewise if the husband pledges the wife's *paraphernalia*, and dies, leaving a sufficient estate to redeem the pledge, and pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate.—But the husband may alienate the same in his lifetime^q; that is, he may transfer the property to another. To alienate, or to alien, chiefly relates to lands or tenements, as to alien land in fee, is to sell the fee-simple thereof.

^k 2 Black. Com. 435.

^l 1 Roll's Abr. 911.

^m The Court of Chancery.

ⁿ For what specialty creditors are,
see post.

^o For what real assets are, see
post.

^p *Snelson and Corbet*, 3 Atk. 369.

^q 3 Atk. 394.

(9) And if the husband pawn the wife's *paraphernalia* and die, leaving a fund sufficient to pay all his debts and to redeem the pledges, she is entitled to have them redeemed out of his personal estate. *Graham v. Londonderry*, 3 Atk. 395.

Thus having proceeded with the particulars of what the administrator is interested in, we shall conclude this section with some observations on the law concerning personal property; as that the same is subject to that law which governs the persons of the owner. With respect to the disposition of it, and with respect to the transmission of it, either by succession, or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country. And where a person had possessed himself of a debt here, which was due to the intestate, a subject of Jersey, and whose personal property was therefore governed by the law of Jersey, (of which mention hath heretofore been made) Lord Hardwicke was applied to by his other relations resident in England, stating that they should be excluded from a share according to the distribution of Jersey, but that they should be intitled according to the distribution in England; and they therefore prayed by their bill, that the administratrix might be restrained from taking the property to Jersey. But his lordship would not restrain the administratrix, nor direct in what manner she was to dispose of the property, or to distribute it. And determined that she, having acquired a right to the property, was to distribute it according to the law which guided the succession to the personal estate of the intestate.

SECTION III.

Of making an Inventory.

THE executor or administrator is to make an inventory of all the goods and chattels, whether in possession or action of the deceased; which he is to deliver in to the ordinary

upon oath, if thereunto lawfully required¹ (10). It is said, that if an executor, without making an inventory, shall interfere in the administration of the goods of the deceased, except in certain cases; such as the funeral expences, the necessary preservation of the goods, and the like, he shall be bound to answer to every one of his creditors his whole

¹ 2 Black. Com. 510.

(10) The Canons require an inventory to be exhibited even before probate is granted; and this was the old practice of the Prerogative Court, and indeed is still the practice in some country jurisdictions. The stat. 21 H. 8. c. 5. s. 4. requires executors and administrators to exhibit inventories as a part of their duty, without any proceedings to call upon them to do so. The modern practice, however, is not to render an account unless it shall be called for; but the executor or administrator should remember that he has bound himself by his oath to render a just account when he is by law required. The Ecclesiastical Court may, and in some instances does, for the protection and security of the parties interested, require *ex officio*, that an inventory shall be exhibited; and though the court does not exact this in all cases, still it always will, where a party having an interest in the property applies for it. And the production of an inventory being so much a matter of duty, it has been laid down in a variety of cases, that a probable or contingent interest will justify a party in calling for it, and an account. *Phillips v. Bignell*, 1 Phillim. Rep. 241. So a creditor is entitled to have a *constat* of the assets that have come to the executor's hands. *Barclay v. Marshall*, 2 Phillim. Rep. 188. and in this respect no distinction exists between a legal and an equitable creditor. *Myddleton v. Rushout*, 1 Phillim. 244. There is only one case in which the right of a creditor to an inventory is controlled, and that is, where he has brought a suit in Chancery for a discovery of assets, and then it has been said that he shall not proceed in both courts. *Ib.* 247. In some instances, as where, the accounts being old, the documents have been lost and the vouchers destroyed, lapse of time will weigh with the court, and induce it to reject an application calling for an inventory; but lapse of time will be of no avail, if, as in the case of a minor, it be the duty of the executor to preserve the documents and vouchers. *Ib.* 242.

debt^u; and that every legatary may recover his whole legacy at his hands; for in this case the law presumeth, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same. Whereas otherwise the executor is presumed not to have any more goods which were the testator's than are described in the inventory, the same being lawfully made^v. And therefore if any creditor or legatary affirms, that the testator had any more goods than are comprised in the inventory, he must prove the same; otherwise the judge is to give credit to the inventory, being made in the due form of the law^x. But as the time of exhibiting such inventory is left to the discretion of the ordinary, he may remit the making of it for a reasonable cause: as, where it may be expedient that the quantity of goods should not be divulged^y.

By the constitution of Othobon, the inventory shall be made in the presence of some credible persons, who shall competently understand the value of the goods belonging to the deceased; for it is not sufficient to make an inventory, unless the goods therein contained are particularly valued and appraised by some honest and skilful persons according to their just value in their judgments and consciences; being estimated according to such price as the same might be sold for at that time^z. — By the practice of the courts, if the goods of the deceased shall be appraised by any honest persons in the neighbourhood, and reduced into an inventory, and afterwards the inventory shall in due time be exhibited before the judge who proves the will or grants administration, upon the oath of the executor or administrator; such inventory shall receive credit in all causes and courts; and he that exhibits it shall be freed from the burden of proving the truth thereof, or that the testator had no more goods; but the legatee, or other persons preferring claims, are to prove that goods have been omitted therein^a.

^u Swinb. 228.

^v *Ibid.*

^x *Ibid.* 426.

^y Lind. 176.

^z Swinb. 425.

^a 1 Oughton's *Ordo Judiciorum*, 344.

Sometimes when there is a contest, it is demanded, and by the judge decreed, at the instance of the party having interest in the goods of the deceased, that an inventory be exhibited upon the oath of the executor or administrator, before the issuing of the probate or letters of administration under seal; and then, notwithstanding the former general oath had been taken for the faithful administering the goods of the deceased, and for exhibiting a true inventory, a special oath hath been used to be taken, at the time of exhibiting the inventory, of the truth thereof, and that either personally or by virtue of a commission. And sometimes before the granting, or at least before the issuing, of the probate or letters of administration (instead of an inventory of the goods of the deceased upon the oath of the party), at the request of some person having interest, the judge issueth a commission for the appraisement and true valuation of the goods, rights, and credits, and inspection of the obligations, leases, and other writings and papers whatsoever, concerning the personal estate of the deceased, at the house of the deceased or elsewhere, wheresoever his goods, rights, or credits remain or be, on such day or days, with continuation and prorogation of the time and place, as shall be needful. Also in these cases, there usually issues a monition against the other party in special, and all others in general, with whom any of the goods, rights, or credits of the deceased remain and be, that they exhibit or shew, or cause to be exhibited or shewn, really and with effect, to the appraisers, by virtue of the commission aforesaid, at the time and place of the execution thereof, the aforesaid goods, rights, and credits of the deceased, and also the bonds, leases, and other writings and papers concerning the personal estate of the deceased, remaining or being with them, or any of them; to the end that they may be appraised and put in the inventory, on pain of law and contempt.—Such commission being duly executed, the inventory is brought in and exhibited, signed by the hands of the commissioners or appraisers, or two of them at the least, with-

out the oath of the party for the truth thereof. And also in such case, an inventory is often required upon the oath of the executor or administrator, of such goods of the deceased as have been already disposed of^c.

After the inventory is exhibited, a creditor shall not be admitted to object thereto in the ecclesiastical court; for the statute^d which requires the executors or administrators to make an inventory, only enjoins them to deliver it in upon oath into the keeping of the ordinary; and the ordinary, by the same statute, is required to receive the same so presented or tendered to be delivered. The court of King's Bench being moved, to grant a prohibition to the ecclesiastical court, on behalf of Mrs. Catchside, an administratrix; she having been cited into an inferior ecclesiastical court at the promotion of Ann Ovington, a creditor, to exhibit an inventory, which she accordingly brought in, and the creditor objected to it and obtained a decree. The administratrix then appealed to the superior ecclesiastical court, which affirmed the decree. The suggestion on which the plea for a prohibition was built was, the want of jurisdiction of those courts. The reply to which, on shewing cause, was, that it being after sentence, it was now too late for a prohibition, unless it should appear that they had determined contrary to law. But Lord Mansfield and the court were of opinion, that from the face of the proceedings, it appeared that the spiritual court had no jurisdiction, and therefore the rule for a prohibition was made absolute^e (11).

^c 1 Ought. 344, 345.

^d 21 Hen. 8. c. 5.

^e *Catchside and Ovington*, 1 Burr. Rep. 1922.

(11) In a late case a prohibition was granted to the Consistory Court, where it proceeded to hear the exceptions to an inventory exhibited by an executor on the ground that the office of the ordinary is merely ministerial to receive the inventory when tendered. *Henderson v. French*, 5 Mau. & Selw. 406.

The things that are to be put in the inventory, we may perceive by what has before been said, concerning the particulars the administrator is interested in, by virtue of his administration (12). — Debts owing to the deceased, of which there is no writing or obligation, it is said, ought not to be put into the inventory before they be received ; because before that they are not found to be debts, at least so much as that they may be handled or taken hold of ; but afterwards when such debts are received, they ought to be put into the inventory as goods newly accruing^s. But unless they be bad debts it seems best to insert them ; and even if they be bad debts, or desperate, yet they may be inserted, specifying them as such. And if in the course of administration they shall be recovered, then they shall be accounted for in like manner as the rest of the personalty : and if they cannot be recovered, or so much of them as cannot be recovered, shall not be accounted for as any part of the goods of the deceased^h (13). — Debts which the deceased owed to others, says Lindwood, ought not to be put in the inventory ; because they are not the goods of the deceased, but of other persons. Yet they may be put in, if it shall seem expedient^l. — If the inventory should never be required, yet the person who applies for an administration, should obtain knowledge of the value of the deceased's goods, chattels, and credits ; that he may be prepared to take the oath mentioned in the fourth section of the foregoing chapter.

^s Lind. 176.

^l Lind. 176.

^h 4 Burn's Eccles. Law, 241.

(12) The Ecclesiastical Court exercises a judgment on this subject, and in complicated cases the sort of inventory it will accept is discretionary. *Reeves v. Freeling*, 2 Phillim. Rep. 56.

(13) See *Shelly's case*, 1 Salk. 296. *Smith v. Davies*, Bull. N. P. 140.; *Brightman v. Keighly*, Cro. Eliz. 43.; *Young v. Cordery*, 3 B. Moore, 66. and post, p. 58. n. 19.

By the statute of the 5 W & M. c. 20., and 9 W. c. 25. it is required that the inventory be written or ingrossed on paper or parchment, having a double sixpenny stamp; and by the statute of the 48 Geo. III. c. 149. there is imposed a duty of one pound; so that now the inventory must be written or engrossed on paper or parchment, stamped with a one pound stamp. — It may be made in the following form, with variations, according to the condition of the goods to be inventoried.

A TRUE and perfect inventory of all the goods, chattels, wares, and merchandizes, as well moveable as not moveable, of A. B. late of C. in the county of ———, in the diocese of ———, yeoman, deceased, made by us whose names are hereunto subscribed, the ——— day of ———, in the year of our Lord

	£.	s.	d.
His purse and apparel	15	0	0
Horses and furniture	20	0	0
Horned cattle	27	0	0
Sheep	20	0	0
Swine	0	13	0
Poultry	0	3	4
Plate, and other household goods	18	0	0
One lease of, &c.	30	0	0
Rent in arrear	35	0	0
Corn growing at the time of his death	12	0	0
Hay and Corn	10	0	0
Ploughs, and other implements of husbandry	6	10	0
Debts	100	0	0
Total	294	6	4
Other debts supposed to be desperate	25	2	6
Debts owing by the deceased, 250 <i>l</i> .			

Appraised by us the day and year above written,

D. E.

F. G.

SECTION IV.

Of getting in the Effects, and what shall be Assets in the Administrator's Hands to make him chargeable.

FOR collecting the goods and chattels of the deceased, the executor or administrator has very large powers and interests conferred on him by the law, being the representative of the deceased. And an executor or administrator may, after the death of the deceased, enter into the house where the deceased lived, and where he died, and where the goods are, and take them away, and justify it; but he must do it within convenient and reasonable time, as within thirty days after his death, or thereabouts, and in a quiet and fair manner when the door is open^k.—In the former part of this chapter we have seen that administrators are put upon the same footing, with regard to suits, as executors appointed by will, and that they shall have actions to demand and recover, as executors, the debts due to the intestate. An administrator may have an action upon a judgment, statute, recognizance, obligation, or other specialty, made to his intestate; or upon any covenant (14) or contract; and he shall have an action

^k Shep. Touch. 453.

(14) The right of an executor or administrator to maintain an action upon a covenant entered into with his intestate, depends either upon the nature of the covenant, or upon the fact of a breach of it committed in the lifetime of the deceased being attended with a direct injury to his personal estate. Covenants are divided into the two classes of real and personal, and the distinction with respect to the course in which they go to the representatives of the person with whom they are made, is a clear one: real covenants run with the land, and either go to the assignee of the land, or descend to the heir, and must be taken advantage of by him alone; but personal covenants must be sued for by the executor or administrator. However, in the case of covenants which regard the

of trespass or trover for the goods of the intestate taken in his life; and an action for a trespass with cattle in his close¹ (15). And towards the beginning of this chapter we

¹ Com. Dig. Administration, (B. 13.)

inheritance, if they are broken in the lifetime of the deceased, and an actual damage accrues to him whereby his personal estate is damnified, his personal representative may sue upon it. Therefore in the case of *Lucy v. Levington*, 2 Lev. 26. S.C. 1 Ventr. 175., where the testator in his lifetime had been evicted out of freehold lands, it was decided that his executor might maintain an action upon the covenant for quiet enjoyment, for the testator, by the eviction, being deprived of the rents and profits, of course the personal estate was so far diminished. See also *Knights v. Quarles*, 4 B. Moore, 532. S.P. But though a real covenant be broken in the lifetime of the testator, yet if his personal estate be not actually prejudiced thereby, the right of action devolves upon the heir, and cannot be enforced by the personal representative. This was determined in a late case where an executrix brought an action upon a covenant for title, contained in a conveyance of lands in fee, assigning as a breach that the covenantor had no title; but the court held, that inasmuch as the estate belonged to the heir, and the breach did not allege that the testator in his lifetime had sustained any damage, the executrix did not stand in a situation to take advantage of the covenant. *Kingdon v. Nottle*, 1 Mau. & Sel. 354. See also *King v. Jones*, 1 Marsh. 107. S. C. 5 Taunt. 418. and 4 Mau. & Selw. 188.

(15) The statute of 4 Ed. 3. c. 7. which recites *that in times past executors had not had actions for a trespass done to their testators, as of the goods of the said testators carried away in their life*; and enacts, "that the executors in such cases shall have an action against the trespassers in like manner as they, whose executors they are, should have had if they were living," has been largely and equitably expounded, and has been held to extend to an administrator. *Smith v. Colgay*, Cro. Eliz. 384. And it applies not only to a trespass and carrying away the goods, but also to a case in which the testator loseth his chattel by a tortious interference. Therefore a *quare impedit* will lie by an executor or administrator, for a disturbance to the deceased. Bishop of Coven-

have seen, that for the most part the same actions the deceased might have had, the administrator shall have also; and that in actions arising by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against, or by the executors or administrators. Likewise we have seen, that administrators are empowered to distrain for rent in arrear. — Where any judgment after verdict shall be had, by or in the name of any executor or administrator; in such case an administrator of goods not administered, may sue forth a writ of *scire facias*, and take execution upon such judgment^m.

In all actions brought by executors or administrators, upon contracts, bonds, or other things made to the deceased, or for goods taken away in his life, they shall pay no costs by

^m Stat. 17 Car. II. c. 8.

try's case, 1 And. 241. S.C. Savile, 118. And ejectment may be maintained by a personal representative for lands held for a term of years, whether the ouster were after or before the death of the deceased. *Slade's case*, 4 Rep. 92, 95. *Doe d. Shore v. Porter*, 3 T. R. 13. So he may have an action of debt on Stat. 2 & 3 Ed. 6. c. 13. for not setting out tithes due to the testator, *Moreton's case*, 1 Ventr. 30.; or an action on the case against the sheriff, for a false return made in the lifetime of the testator, to a *feri facias*, *Williams v. Grey*, Lord Raym. 40.; or an action of debt, on a judgment against an executor, suggesting a *devastavit* in the lifetime of plaintiff's testator. *Berwick v. Andrews*, *ib.* 973. In like manner, it has been holden, that an administrator may maintain an action against the bailiff of a liberty for executing a *feri facias*, and removing the goods off the premises, before the landlord (the intestate) was paid a year's rent, pursuant to the stat. 8 Ann. c. 17. *Palgrave v. Windham*, Stra. 212. But the statute does not give trespass to an executor for a *clausum fregit* or trees cut down in the lifetime of his testator. *De Mason v. Dixon*, Sir W. Jones, 174. See also *Williams v. Breckon*, 1 Bos. & Pul. 329.

any statute^a. Executors and administrators, when suing in the right of the deceased, shall pay no costs: for the statute 23 Hen. VIII. c. 15. doth not give costs to defendants, unless where the action supposes the contract to be made with, or the wrong to be done to, the plaintiff himself^b. And when an executor must declare as executor, he shall pay no costs: but if the cause of action arises in the time of the executor, and is therefore a matter within his knowledge, and for which he may declare in his own right, and need not declare as executor, he shall be liable to pay costs^c. — On a question, whether an executor should be permitted to discontinue, without payment of costs. For the plaintiff executor, it was urged that an executor should not pay costs in any instance excepting one, viz. where he had brought an action as executor, which he might have brought in his own name; but the court were of opinion, that the giving an executor leave to discontinue, was matter of discretion in the court; and they ought not to give him such leave, in any case where he hath knowingly brought his action wrong, unless he will consent to pay costs^d. On a judgment of *non prosequitur*^e, for the executor's wilful delay he shall pay costs^f (16).

^a New. Abr. tit. Costs.

^b 3 Black. Com. 400.

^c Str. 682.

^d Bur. 1451.

^e *Non prosequitur*, or, as it is usually termed, *non pros.*, is where any person commences an action and does not declare, either the term the writ is returnable, or before the end of the ensuing term; the defendant against whom the action is

brought, having appeared, may sign a *non pros.* at any time in the vacation of such ensuing term. Imp. K. B. Prac. 414. And the plaintiff for thus deserting his complaint, in not pursuing his action, shall not only pay costs, but is liable to be amerced to the king. 3 Black. Com. 296.

^f Bur. 1548.

(16) Where the plaintiff sued as executor, and was non-sued, upon evidence being given at the trial, that the supposed testator was still alive, the Court refused to allow costs to the defendant; it appearing from affidavits on both sides, to be still at least doubtful, whether the supposed testator was living or not. *Zachariah v. Page*, 1 Barn. & Ald. 386. And where a plaintiff sued as executor for a

Assets are real or personal; where a man has lands in fee-simple, and dies seised thereof, the lands which come to his heir are assets real; and where he dies possessed of any personal estate, the goods which come to the executors or administrators are assets personal. Assets are also divided into assets by descent and assets in hand. Assets by descent are where a person is bound in an obligation (17), and dies

debt, which appeared on the trial to be claimable, if at all, in the character of surviving partner of the deceased, and was nonsuited, the Court refused to refer it to the Master to tax the defendant's costs, it being doubtful, whether justice would be done by such an order. *Barnard v. Higdon*, 3 Barn. & Ald. 213. The reason why an executor suing in his representative capacity shall not be liable to costs if he fail, is because he is presumed not to be cognizant of the contracts made by the testator; but as he must be cognizant of all contracts made by himself personally, though in his representative character, and as he might declare upon them in his own right, there is no reason why he should be exempt from costs, in case he fail in his action. Per *Lawrence J. Cowell v. Watts*, 6 East, 412. And for a similar reason, executors or administrators are not necessarily exempted from costs on interlocutory motions. *Tidd's Prac.* (7th ed.) 993. Executors and administrators, when defendants, have no privilege with respect to costs. *Plowd.* 183. *Hutt.* 69. 79. And if there be a verdict against them, the judgment is, that the costs be levied of the goods of the testator or intestate, if the defendant hath so much thereof in his hands to be administered, and if not, *de bonis propriis*. 4 T. R. 648. 7 T. R. 359.

(17) By a modern act of parliament (47 Geo. 3. sess. 2. c. 74. s. 1.) it is enacted, "that when any person, being at the time of his death a trader, within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, hereditaments or other real estate, which he shall not by his last will have charged with or devised, subject to or for the payment of his debts, and which, before the passing of this act, would have been assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the

seised of lands which descend to the heir, and which lands shall be assets, and the heir shall be charged as far as the land to him descended will extend[†]. *Assets* in hand are where one dies indebted, and appoints executors, or dies intestate, and the executor or administrator hath sufficient in goods or chattels, or other profits, to pay the debts, or some part thereof: this shall be said to be assets in his hands, and for so much he shall be charged[‡]. There is also another division of assets, into *legal* and *equitable* assets: *legal assets* are such as are liable by the course of law; *equitable assets* are such as are only liable by the help of a court of equity. As to real assets and assets by descent, which more immediately concern the heir, more will be said

[†] Terms of the Law.

[‡] Shep. Touch. 472.

" just debts of such person, as well debts due on simple
 " contract as on specialty; and that the heir or heirs at law,
 " devisee or devisees of such debtor, shall be liable to all
 " the same suits in equity, at the suit of any of the creditors
 " of such debtor, whether creditors by simple contract or
 " by specialty, as they were before the passing of this act
 " liable to at the suit of creditors by specialty in which the
 " heirs were bound; provided always, that in the admi-
 " nistration of assets by courts of equity under and by
 " virtue of this act, all creditors by specialty in which the
 " heirs are bound, shall be paid the full amount of the
 " debts due to them, before any of the creditors by simple
 " contract or by specialty, in which the heirs are not
 " bound, shall be paid any part of their demands." It is
 observable, that the provisions of this statute apply to those
 debtors only who, at the time of their decease, were traders;
 and, therefore, if a debtor were never a trader, or if before
 his death he ceased to trade, a simple contract creditor
 cannot claim relief against his real assets. *Keene v. Riley*.
 3 Meriv. 436. And if the heir at law of the debtor be an
 infant, it seems that a sale of the estate cannot be decreed
 during his minority, but must be postponed until he is of
 full age. *Lechmere v. Brasier*, 2 Jac. & Walk. 290. See
 a learned note by Mr. Serj. Williams, as to what shall be
 assets by descent, *Jefferson v. Morton*, 2 Saund. 8. d.

hereafter^x. We shall therefore proceed to consider what are assets in the administrator's hands to make him chargeable.

All those goods and chattels, actions and commodities, which belonged to the deceased in right of action or possession, as his own, and so continued to the time of his death, and which after his death the executor or administrator gets into his hands, as duly appertaining to him in right of his executorship and administration; and all such things as come to the executor or administrator in lieu, or by reason of that, and nothing else, shall be said to be assets in the hands of the executor or administrator, to make him chargeable to a creditor or legatee^y (18).

Assets in the hands of one of the executors shall be said to be assets in the hands of all the executors; and assets in any part of the world shall be said to be assets in every part of the world: and therefore if that point be in issue, and it appear that there are assets in the hands of any one of the executors, or in any county or place whatsoever, the jury must find that there are assets^z. And though a plantation be an inheritance, yet, being in a foreign country, it is a chattel to pay debts, and a thing that is testamentary^a. All goods and chattels, of what nature or kind soever, that are valuable, as oxen, kine, corn, &c. shall be esteemed assets. But such things as are not valuable, as a presentation to a church, and the like, shall not be accounted assets^b.

All the goods and chattels that come to the executor or administrator, in the right of their executorship, or administration, and are by the law given to them by virtue thereof, in the right of the deceased (as hereinbefore particularised), and which are in possession, shall be esteemed

^x Vide post.

^y Shep. Touch. 472.

^z *Ibid.*

^a 2 Vent. 358.

^b Shep. Touch. 472.

(18) It has been held, that the produce of the sale of the goodwill of a public house, which was held on for some time by an administratrix as a tenant at will is assets. *Worral v. Hand*, Peake's N.P.C. 74. And see *Jury v. Woodhouse*, Barnes, 333. 12 Vin. Abr. 206. pl. 9.

assets in their hands; and goods pledged to the deceased, and not redeemed, or the money wherewith they are redeemed, shall be said to be assets in the hands of the executor or administrator^d. And all the goods and chattels in action or possibility at the time of the death of the deceased, that are afterwards recovered, and of which the executor or administrator hath obtained possession; when they are so recovered, are esteemed assets in his hands. But they are never accounted assets, until they are recovered and in possession; therefore if there be debts owing to the deceased upon statutes or obligations, or otherwise, these are never esteemed assets in the hands of the executor or administrator, until they are recovered (19). So likewise, though there be

^d Shep. Touch. 473.

(19) In this respect, a distinction prevails between the cases where an inventory has been exhibited and where it has not; for if on the trial of an action against an administrator an inventory exhibited by him in the spiritual court be produced, it is evidence of assets to the amount therein stated, unless he discharge himself of the items. *Hickey v. Hayter*, 1 Esp. 313. *Giles v. Dyson*, 1 Stark. 32. Another distinction has been drawn between sperate and desperate debts, when they are separated in the inventory; and with respect to the former, the rule was thus laid down by Lord Holt: — "All sperate debts mentioned in the inventory shall be counted assets in the executor's hands; for that is as much as to say, that they may be had for demanding, unless the demand and refusal be proved." *Shelley's case*, 1 Salk. 296. And in Buller's N. P. 140. the case of *Smith v. Davies* is mentioned, where Lord Hardwicke is reported to have said, "if in the inventory produced, the article concerning debts did not distinguish between sperate and desperate, it would be sufficient to charge the executor with the whole *primd facie* as assets, and put it upon him to prove any of them desperate, as if the article were *item* for debts due and owing, which I admit myself to be charged with when recovered or received." In a recent case, where executors pleaded *plene administraverunt*, except goods and chattels to the value of a certain sum, and in order to establish their plea, put in

debt or damage, recovered by a judgment had by the deceased, until execution be made this shall not be esteemed assets in the hands of the executor or administrator. So if the executor bring an action of trespass against another *de bonis asportatis in vita testatoris*, for goods carried away in the life of the testator, and he have a judgment for damages; in this case, until he hath recovered by execution, it shall not be esteemed assets in his hands. And if the judgment be erroneous, and the execution avoidable; in this case, although it be recovered and gotten in possession, yet it shall not be esteemed assets. And therefore, if one sue another, and recover against him as administrator of J. S. and after a testament made by J. S. is produced and proved, and thereby an executor is made; in this case the money recovered by the administrator shall not be said to be assets in his hands as to any of the creditors; because the executor may recover it from him, or the debtor will have it again. And if the executor or administrator never recover, or get the thing into his possession, he shall never be charged, especially where he has done his best to get it, and cannot.

If one covenant to make a lease for years to the deceased, his executors or administrators, and after his death the lease is made to the executor or administrator accordingly; in this case, this lease shall be said to be assets in his hands, and he shall be chargeable for so much to any creditor*. And if an executor renew, he shall account for the new lease as

* Shep. Touch. 473.

evidence an inventory and account which they had exhibited in the Ecclesiastical Court; wherein they admitted, that they had a balance in their hands to the amount pleaded; but in that amount was included a smaller sum, which was stated to consist of sundry debts due to the deceased, *supposed to be recoverable*; it was held, that as the defendants did not shew that those debts could not be recovered, they were to be considered as assets for the purpose of the suit, without evidence that they had been paid. *Young v. Cordery*, 3 B. Moore, 66. See Selw. N. P. 763. n. (30).

well as the old, for the benefit of the creditors ^f. And whatsoever the executor or administrator must be forced to sue for by the name of executor or administrator, being recovered, shall be esteemed assets in his hands ^g. And if an executor recovers (as executor) things in chancery by equity, these things recovered shall be assets ^h.

Although the thing be extinct, and gone as to the executor and administrator himself, yet it may have its being, and be accounted assets as to creditors and legatees. And therefore, if an executor or administrator have a lease for years of land, in the right of the deceased, and afterwards he purchase the fee-simple of the land (whereby the lease is drowned), yet in this case the lease shall continue to be assets as to creditors and legatees ⁱ. And if an executor surrenders a term of years which he had as executor to him in reversion, it is not extinct as to him, but shall still remain assets in the executor to satisfy debts and legacies ^k. And if the debtee make the debtor his executor, or the debtee die intestate, and the administration is committed to the debtor; in these cases the debt shall be said to continue, and shall be esteemed assets for so much as to other creditors ^l.

The goods and chattels of other men in the hands of the executor or administrator, that were in the possession of the deceased, if he had no right in them, or if he had, and they do not belong to the executor, will not make the executor or administrator chargeable; for these shall not be esteemed assets in his hands. And therefore, if the goods of another man be amongst the goods of the deceased, and these come together into the hands of an executor or administrator, these goods that are the goods of another shall not be said to be assets in the hands of the executor or administrator. And if the executor receive a rent that belongs to the heir, this rent shall not be said to be assets in his hands: and hence it is that if the deceased were out-

^f 2 Cha. Ca. 208.

^g Shep. Touch. 473.

^h 1 Roll's Abr. 920.

ⁱ Shep. Touch. 473.

^k 1 Co. Rep. 87.

^l Shep. Touch. 474.

lawed at the time of his death, his goods and chattels are not to be accounted assets, for they are none of his ^m.

A release of a certain debt due to the testator makes it assets in the executor's hands; because it shall be intended he would not have made the release unless the money had been paid to him ⁿ. And if an executor puts in suit a bond of 100*l*. for performance of covenants, and the parties submit to an award, and it is awarded that the obligor shall pay 70*l*. in full satisfaction, and that the executor shall release, which is done accordingly: it seems, that the executor shall be taken to have assets to the value of the whole 100*l*.; for though by the award he was compelled to release, it was his own act to submit to the arbitrament ^o (20).

^m Shep. Touch. 474.

^o 3 Leon. 53.

ⁿ 1 Nelf. Abr. 262.

(20) Where a defendant binds himself as an administrator to abide by an award to be made touching matters in dispute between his intestate and another, and the arbitrator awards, that he as administrator shall pay a certain sum, it operates as an admission of assets between those parties, and the defendant cannot plead *plene administravit* to an action of debt on the bond; because the giving such a bond is an undertaking to pay whatever the arbitrator may award. *Barry v. Rush*, 1 T. R. 691. And in such a case, if an attachment be moved for against the administrator for the nonpayment of the money awarded, he cannot defend himself against it by suggesting a deficiency of assets; for a submission to arbitration by a personal representative is considered as a reference, not only of the cause of action, but also of the question, whether or not he has assets. And when the arbitrator awards that the personal representative do pay the amount of the plaintiff's demand, it is equivalent to determining, as between those parties, that the personal representative has assets to pay the debt. *Worthington v. Barlow*, 7 T. R. 453. But the mere submission to arbitration is not of itself an admission of assets; for in a case where the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it, it was holden, that the administrator might plead *plene administravit*. *Pearson v. Henry*, 5 T. R. 6. Where two makers of a promissory

If a man hath a lease for years worth 20*l.* *per annum* at the rent of 5*l.* and he die; in this case not the whole value of the land, but so much as is above the rent, shall be said to be assets in the hands of the executor or administrator^p. As, where an executor has a lease for years of the value of 20*l.* a year, rendering rent of 10*l.* a year; it is assets in his hands only for 10*l.* over and above the rent^q. — By the statute of the 14 Geo. II. c. 20. before mentioned, it is enacted, that estates *pur auter vie*, in case there be no special occupant^r thereof, of which no devise shall have been made according to the statute of the 29 Car. II. c. 3. or so much thereof as shall not have been so devised, shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. And by this statute of Car. II. an estate *pur auter vie* shall be assets in the hands of the heir, if he has it as special occupant.

If there is a mortgage for years (whatever be the number), this is assets at law; because the whole interest is not gone from the mortgagor, the reversion in fee being left in him: but if it is a mortgage in fee, it is only assets in equity, because the legal estate is gone out of the mortgagor^s. If the heir of the mortgagee forecloses the mortgagor, yet the land shall go to the executor, unless the heir pays him the mortgage money, and then he may have the benefit of the mort-

^p Shep. Touch. 474.

^q Cro. Eliz. 712.

^r A special occupant, is, where an estate for life is made to a man and his heirs; in such case the heir shall have the estate, after the decease of

his ancestor, as special occupant, or as a person particularly described, to whom the estate shall go after the lessee's death. 4 Burn's Eccles. Law, 60.

^s Ibid. 276.

note gave it to a creditor of their testator, whereby, "as executors, they jointly and severally promised to pay on demand with interest," it was held, that a note so framed amounted to a confession of assets, and that they were personally liable. *Childs v. Monins*, 5 B. Moore, 282. S. C. 2 Brod. & Bing. 460. See *Bowerbank v. Monteiro*, 4 Taunt. 844.

gage^u. When upon a mortgage, money is made payable to the heir or executor, in that case, before or at the day of payment, the mortgagor hath election to pay it to either; but after the day of payment is past, and the mortgage forfeited by law, though equity doth give the mortgagor relief, so as upon the payment of the money, he shall have his land, yet equity will not revive the election of the mortgagor to pay it to the heir or executor; but then he shall be forced to pay it to the executor; because it came out of the personal estate of the testator, and thither it shall return. But if in the mortgage neither heir nor executor is mentioned, then, after the death of the mortgagee, the law determines it to be paid to the executor^w.

The interest which a master hath in a servant is not assets in the hands of an executor; for a servant whose master is dead, is legally discharged, and is not servant either to the heir or executor^x. But the interest which one hath in an apprentice, is different from that in a servant, of which we shall see more hereafter.—The interest in the liberty of a prisoner in execution for debt, is a chattel personal, and shall go to the executors^y.

Having seen, in the former part of this section, that the administrator has very large powers conferred on him by the law, here we may observe, that all acts done by him, as long as the administration continues in force, are good, and even though it be afterwards revoked or repealed. But there is a difference taken (6 Co. 18.) when an administration is repealed upon a citation, or upon an appeal. If it is upon an appeal, which suspends the administration, all acts after such suspension are void: if it is repealed upon a citation, all the acts of the administrator, till the repeal, are good; for by the citation the grant of the administration is not suspended; therefore if the administration be repealed, all acts done by an administrator, which a rightful administrator might have done, shall be allowed; for in them

^u 2 Vern. 67.

^x Went. 55.

^w 2 Freem. 20. Co. Litt. 208.

^y Law of Test. 341.

b. Note 1. 13th edit.

he acted in the place of a rightful administrator². But if there is any fraud, a creditor may have relief upon the statute of the 19 Eliz. c. 5.³—As it hath often been the case to the defrauding of creditors, that such persons who were to have the administration of the goods of others dying intestate committed unto them, if they required it, would not accept the same, but suffered or procured the administration to be granted to some stranger of mean estate, and not of kin to the intestate, from whom themselves, or others by their means, took deeds of gift, and authorities by letters of attorney, whereby they obtained the estate of the intestate into their hands, and yet stood not subject to any debts by him owing; it is enacted by the statute of the 43 Eliz. c. 8. That every person who shall obtain any goods or debts of any person dying intestate, upon any fraud as is above mentioned, or without such valuable consideration as shall amount to the value of the same goods or debts, or thereabouts (except it be in satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate,) shall be charged as executor of his own wrong, so far as such goods and debts will satisfy.

If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased, and many other transactions), he is called in law executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong (21). Such

² Comyns, 150.

³ 6 Co. Rep. 19.

(21) So a person who acts under the authority of the rightful administrator, is not chargeable as executor *de son tort*, because his acts are referable to the authority delegated to him; and are, in legal effect, the acts of the

an one cannot bring an action himself in right of the deceased, but actions may be brought against him. He is chargeable with the debts of the deceased so far as assets come to his hands; and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree, himself only excepted. And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages (22), unless perhaps, on a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt ^b. — As the executor of his own wrong is liable to the suit of the rightful executor, creditor, or legatees; so also, in case of his death, are his executors or administrators liable, by the statute of the 30 Car. II. c. 7., although in other cases a personal wrong dies with him that did it ^c.

^b 2 Black. Com. 507. An executor *de son tort*, cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor *after the action is brought*. Nor can he retain for his own debt of a higher

nature by consent of the rightful executor given after the bringing the action, by the creditor. *Curtis v. Vernon*, 3 Durnf. & East. Rep. 587.

^c 4 Burn's Eccles. Law, 191.

rightful administrator himself. *Hall v. Elliott*, Peake's N. P. C. 86. But if one of several executors who has proved a will authorize a person to act for him, and that person after the death of such executor continue to act, he may be then charged as executor *de son tort*, notwithstanding he act under the advice of another of the executors who has not proved. *Cottle v. Aldrich*, 4 Mau. & Selw. 175.

(22) But in a late case where A. took out probate of a will by which he was appointed executor, and, after notice of a subsequent will, sold the goods of the testator; it was held, that the rightful executor in an action of trover was entitled to recover the full value of the goods sold, and that A. was not entitled, in mitigation of damages, to shew that he had administered the assets to that amount. *Woolley v. Clark*, 5 Barn. & Ald. 744. See *Mountford v. Gibson*, 4 East, 441.

SECTION V.

The Administrator's Office and Duty in paying Debts.

IN payment of debts the executor or administrator must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of lower degree first, he must answer those of a higher out of his own estate^d. And as to debts of equal degree, he may, as we have before seen, retain what is due to himself.

First, The executor or administrator may pay all funeral charges, and the expence of taking the letters of administration^e. But as to funeral charges, it is said, that in strictness, no funeral expences are allowed against a creditor, except for the coffin, ringing the bell, parson, clerk, and bearers' fees; and not for pall or ornaments^f. And in general it is said, that no more than forty shillings for funeral expences shall be allowed against creditors^g (23).

Secondly, Debts due to the king on record or specialty,

^d 2 Black. Com. 511.

^f 1 Salk. 196.

^e *Ibid.*

^g 3 Atk. 249.

(23) In Buller's N. P. 143. it is said, that the sum usually allowed is 5*l.*, and such an allowance was made by Lord Hardwicke in *Smith v. Davies*, Middlesex sittings after Mich. Term, 10 Geo. 2. But if there are assets, the allowance shall be according to the estate and degree of the deceased. In *Stagg v. Punter*, 3 Atk. 119., the testator having desired to be buried at a church 30 miles distant, and it not being clear that there would be a deficiency, Lord Hardwicke allowed 60*l.* for funeral expences. So in *Offley v. Offley*, Prec. Ch. 26. 600*l.* was allowed in respect of the testator's quality, and his having been buried in his own country. In the case of *Gregory v. Lockyer*, 6 Madd. 90. the Vice Chancellor (*Sir John Leach*.) doubted, whether a husband has a right to throw his wife's funeral expences upon her separate estate.

are to be paid¹. But this must be understood of such debts as are due to the king only by matter of record or specialty, and not of sums of money due to the king upon wood sales, or sales of his minerals, for which no obligation is given; or for amercements in his courts baron or courts of his honours, which be not courts of record; or for fines of copyhold estates there; or of forfeitures to the crown of debts by contract due to any subject by outlawry or attainder, until office thereupon found^k.

Thirdly, Such debts are to be paid, as are by particular statutes to be preferred to all others; as by statute 30 Car. II. c. 3. are the forfeitures for not burying in woollen; and by statute 17 Geo. II. c. 38. is the money due from overseers on poor-rates; and by statute 9 Ann. c. 10. the money due for letters at the post-office¹. As to the forfeitures for not burying in woollen, these by the statute 30 Car. II. c. 3. sect. 4. shall be paid out of the estate of the person deceased, before any statute, judgment, debt, legacy, or other duty whatsoever. And as to money due from overseers, by the statute of 17 Geo. II. c. 38. sect. 3. if any overseer of the poor shall die, his executors or administrators shall, within forty days after his decease, pay out of the assets all money remaining due, which he received by virtue of his office, before any of his other debts are paid. And as to money due for letters to the post-office, by the statute 9 Ann. c. 10. sect. 30. this shall be preferable in payment before any debt due to any private person.

Fourthly, Debts of record are to be paid, as judgments, (docketted according to the statutes 4 & 5 W. & M. c. 20.) statutes, and recognizances. — A debt of record is a sum of money which appears to be due by the evidence of a court of record, as, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law. This is a contract of the highest nature, being established by the sentence of a court of judicature. Re-

¹ 2 Black. Com. 511.

¹ 2 Black. Com. 511.

* 2 New. Abr. 432. Com. Dig. Administration (C.)

cognizances also are a sum of money recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behaviour, or the like; and these, together with the statutes merchant and staple, &c. if forfeited by non-performance of the condition, are also ranked among the last principal class of debts, viz. debts of record; since the contract on which they are founded is witnessed by the highest kind of evidence, viz. by matter of record^m. — As to judgments, they are not only those had against the deceased in his lifetime, but also debts upon judgments (although by mere confession, and without defence,) had against the executors or administrators for the debts of the deceasedⁿ. And of two judgments, he who first sues execution must be preferred; but before, it is at the election of the executor or administrator to pay which he pleases first^o. It is not necessary that the judgment be limited to the courts at Westminster; but if it be obtained in any court of record, which hath power to hold plea by charter or prescription of a debt above 40s. it is sufficient. For though upon such a judgment execution cannot there be had, but of such goods as are within the jurisdiction of that court; yet if the record be removed into chancery by a *certiorari*, and there by *mitimus* into one of the benches, then execution may be had upon any goods in any county of England^p. But a judgment not docketted, according to the statutes 4 & 5 W. & M. c. 20., shall not affect any lands as to purchasers or mortgagees; or have any preference against heirs, executors, or administrators, in the administration of the estates of their ancestors, testators, or intestates (24). Which statutes, in

^m 2 Black. Com. 465. 511.

ⁿ Law of Exec. 39.

^o Treat. of Eq. 112.

^p Swinb. 456.

(24) The construction which has been put upon this statute is, that judgments not docketted are thereby placed on a level with simple contract debts: *Hickey v. Hayter*, 6 T. R. 384.

order to render more easy the finding of such judgment entered, direct in what manner alphabetical lists shall be made of judgments by confession, *non sum informatus*, or *nihil dicit*, in any of the courts of record at Westminster; to the respective offices of which any person may resort and search, on paying 4*d.* for every term's search.

It was decreed in the exchequer, that creditors by judgment at law, and creditors by decree in equity, shall be paid equally without any preference ^q. And it is now become the established doctrine, that a decree of the court of chancery is equal to a judgment in a court of law; and where an executrix, whose testator was greatly indebted to divers persons in debts of different natures, being sued in chancery by some of them, appeared and answered immediately, admitting their demands (some of the plaintiffs being her own daughters); other of the creditors sued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of chancery, being for a just debt, and having real priority in point of time, not by fiction and relation to the first day of term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to such decree, and all proceedings against her at law stayed by injunction. This being first decreed by the master of the rolls, was affirmed by lord Talbot, and his lordship's decree was affirmed in parliament ^r. — As to statutes and recognizances, before mentioned, these standing in equal degree, it is at the administrator's election, to give precedence to which he pleases ^s. But those which are forfeited shall be preferred before those which are for the performance of co-

^q Bunb. 48.

^s 3 New Abr. 434.

^r 3 P. Will. 402. Cas. Talb. 217.

Hence to an action on a simple contract debt of the testator or intestate, the personal representative cannot plead an outstanding judgment recovered against the testator or intestate, if it have not been docketted as the statute directs. *Steel v. Rooke*, 1 Bos. & Pul. 307.

venants not broken ^t. And neither between one statute and another, doth the time of antiquity give any advantage as touching the goods of the conusor, but he who first seizeth them by execution is preferred; and before suing of execution, the executor may give precedency to either ^u.

Mortgages may also be reckoned among this last mentioned class of debts; for where a man mortgages land, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage ^x. And though there be no covenant in the deed for the payment of the mortgage money, yet the personal estate shall be liable in the hands of the executor ^y. A mortgage is a charge upon the personal estate, as well as upon the lands mortgaged; and the personal estate is primarily liable: for a mortgage is a general debt, and the land is only as security ^z. It was decreed at the rolls, that mortgages were to be paid before judgments and recognizances: but upon an appeal to the house of lords, it was adjudged that mortgages are not to be preferred to other real incumbrances; but that mortgages, statutes, and recognizances shall take place according to their priority, and as they stand in order of time ^a.

Fifthly, Debts by specialty or special contract are to be paid. When a sum of money becomes, or is acknowledged to be due, by deed or special instrument under seal; such as by deed of covenant (25), by deed of sale, by lease reserving

^t Swinb. 457.

^u *Ibid.*

^x 2 Salk. 449.

^y *Ibid.* 1 Vern. 436.

^z 1 Atk. 487. — For where the

personal estate may not be liable to pay the mortgage money. See Mortgage, in the Index.

^a *Earl of Bristol v. Hungerford.*

2 Vern. 524.

(25) This must be understood of those covenants only which are for payment of a specific sum of money, or which being broken sound in damages, although the damages are not liquidated, 3 Burr. 1380. 6 Mod. 142. For if the covenant be contingent, as, for example, a covenant to save harmless which is not broken, it will not, in the administration of

rent, or by bond or obligation; it is considered a debt by specialty; and such debts are looked upon as the next class after those of record, being confirmed by special evidence under seal^b. And rent in arrear, and unpaid by the intestate, is equal to a debt by specialty; for this savouring of the realty, the administrator can no more wage his law^c against

^b 2 Black. Com. 465. 511.

^c To wage law is, where the defendant swears that he does not owe the plaintiff any thing. This was more common formerly than it is now. It is now only in actions of debt upon simple contract (26), or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods restored, and the account balanced without any evidence of either, that the defendant is admitted to wage his law, and not where there is any specialty by bond or deed. And as the defendant is only allowed to wage his law in an action of debt;

at present, one shall hardly hear of an action of debt brought upon a simple contract, that being supplied by an action of trespass on the case, for the breach of a promise or assumpsit; and this being an action of trespass, no law can be waged therein. So that wager of law is now quite out of use, being avoided by the mode of bringing the action, but still it is not out of force. And therefore, when a new statute inflicts a penalty, and gives an action of debt for recovering it, it is usual to add, 'in which no wager of law shall be allowed.' 3 Black. Com. 341. 347.

assets, stand in the way of a debt by simple contract, 11 Vin. Abr. 305. 2 Vern. 101. Ambl. 160. And if subsequently to the payment of the simple contract debt, the contingency should happen, evidence of such payment may be admitted, on the executor's plea of *plene administravit* to an action by the specialty creditor. 11 Vin. Abr. 307. Aleyn, 40. S.C. Styles, 37. But where the contingency has taken place, although the debt consequent upon it has not been paid, it may be pleaded to an action by a simple contract creditor. As where the testator had executed a bond to A, in 2,800*l.*, conditioned to indemnify him against another bond for 800*l.* which he had executed jointly with the testator to B, for the debt of the testator, in whose lifetime the 800*l.* had become due, and was still unpaid; on the executor disclosing these facts in a plea to an action of assumpsit, and stating that he had administered all, except so much as would satisfy such indemnity bond, it was held to be a sufficient defence. *Cox v. Joseph*, 5 T. R. 307. See also *Musson v. May*, 3 Ves. & Bea. 194.

(26) And for this reason it is that an action of debt on a simple contract cannot now be maintained against an executor or administrator, *Barry v. Robinson*, 1 New Rep. 293.

such a debt, than he can to a debt by specialty^d (27) Where an action of debt was brought against an executor, for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entered into an obligation, and that he had not assets above 5*l.* which were not sufficient to discharge this obligation; on demurrer, it was resolved that this rent, though reserved on a parol lease, was yet equal to an obligation, and that it still remained in the realty, though the term was determined^e.

As to a bond, any voluntary bond is good against an executor or administrator, unless some creditor be thereby de-

^d 2 New Abr. 434.

^e *Ibid.*

(27) For rent which was in arrear in the testator's lifetime, the executor is liable merely in that character; as the testator's debt he can be sued for it in the *detinet* only, and to such action may plead that he has fully administered. *Lyddall v. Dunlap*, 1 Wils. 4. Com. Dig. Administration, b. 14. Whereas, for the subsequent rent, the executor is in general regarded as personally responsible. He has no right to waive the term, for he must renounce the executorship *in toto*, or not at all; and if he enter on the demised premises, as by his office he is bound to do, the lessor may charge him as assignee in the *debet* and *detinet* for the rent incurred subsequently to his entry. *Bolton v. Cannon*, Pollexf. 125. S.C. 1 Ventr. 271. But if the land be of less value than the rent, he may plead the special matter, *viz.* that he has no assets, and the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *detinet* only. *Billinghurst v. Speerman*, 1 Salk. 297. And in a late case, where the defendant, who was administrator of the original lessee, was charged as assignee in an action for use and occupation for rent due after the intestate's death, it was held that although he had taken possession, yet having proved that the premises had been productive of no profit to him, and that eight months after the death of the intestate, he had offered by parol to surrender them to the plaintiff, such proof constituted a good defence to the action. *Remnant v. Bremridge*, 2 B. Moore, 94. See also 1 Wms. Saund. 1. note (1.)

prived of his debt; but if the bond be merely voluntary, a real debt (though by simple contract only) shall have the preference. But if there be no debt at all, then a bond, however voluntary, must be paid by the executor^f (28). And although the executors are not named in an obligation, yet the law will charge them, for that they represent the estate of the testator. And the law is the same of administrators. But the heir shall not at any time be charged without express mention of the heir^g (29).

Before we proceed to consider the last species of debts, viz. debts by simple contract, we may here make some observations on what has been said concerning debts of record, and debts by specialty, and special contract. As to debts of record, we may observe, that the executor ought to take notice of these at his peril^h. But as to debts due by bond or other specialties, although the law requires that debts shall be paid according to their superiority as herein set forth; yet an executor may pay a debt on a simple contract before a specialty; if he hath no notice of such specialty; for otherwise it might be in the power of the obligee to ruin the executor by keeping his bond in his pocket, until the executor shall have paid away all the assets in discharging simple contract debtsⁱ. Respecting obligations, if there be divers of the like kind, it seemeth to be in the power of the executor to discharge which obligation, and to gratify which of the creditors he thinks fit (in like manner as was before said respecting debts of record^k); which being done, the other

^f 3 P. Will. 222. Comyns, 255.

^g Dyer, 28.

^h 2 New Abr. 435.

ⁱ 2 New Abr. 435.

^k Page 68.

(28) But an executor has no authority to pay a bond founded on an usurious consideration, or a bond *ex turpi causâ*. Such payment will amount to a *devastavit*, as well against legatees as against creditors. 11 Vin. Abr. 307. Brownl. 33. Hob. 167. *Robinson v. Gee*, 1 Ves. 254.

(29) See ante, p. 55. n. 17.

creditors are without remedy, if there be no assets ; unless the day of payment in the one obligation is expired, and the day of payment in the other obligation is not yet come ; in which case the former obligation is to be first satisfied ; or unless there be suit commenced for some obligation, for then it is not in the power of the executor to discharge another obligation for which no action is brought, in prejudice of the former suit. But an executor may confess judgment on one obligation, and plead that judgment to an action brought on another obligation(80). And if there be two obligations, and

(80) The rule is, that an executor upon action brought against him by a creditor of his testator has his hands tied, so that he cannot afterwards make any payment to the prejudice of that creditor. But he has no direct power of accelerating a suit instituted by one creditor, and still less have the body of creditors : that being the case, if an executor could not confess a judgment, his operations and duties might be suspended and paralysed by one creditor protracting his suit ; and in the same manner might the other creditors be delayed of their rights. The only means, then, which the executor has of accelerating such suit, is by confessing a judgment, and that he may do to a creditor, *in equal degree*, pending the action, and plead such judgment in bar. *Waring v. Danvers*, 1 P. Wms. 295. *Morrice v. Bank of England*, Ca. Temp. Talbot, 225. *Pickstock v. Lyster*, 3 Mau. & Selw. 374. But if a plea of judgment recovered on a simple contract be pleaded by an executor to an action of debt on bond, it must be averred, that such recovery was had before notice of the bond debt. *Sawyer v. Mercer*, 1 T.R. 690. An executor may also plead *puis darrein continuance*, unreversed judgments on simple contract debts of the testator, recovered against the executor in suits commenced since he pleaded the general issue in bar in the principal case ; and though he might have demurred to such actions, he is not bound so to do. *Prince v. Nicholson*, 5 Taunt. 665. S.C. 1 March. 280. But a judgment confessed by an executrix to a creditor of the testator, as well for his own debt as in trust for the debts of many of the creditors, cannot be pleaded in bar to an action brought against her by another creditor of the testator. *Tolputt v. Wells*, 1 Mau. & Selw. 395. Where an executor pleads an outstanding judgment, the plaintiff may reply, that the judgment was obtained by fraud and covin.

the two several creditors bring several actions against the executor, he that first obtains judgment must be first satisfied¹.

Debts upon judgments, recognizances, mortgages, bonds, and other like specialties, shall carry interest : so interest hath also been allowed upon demands due by covenant, although it was objected that they were not liquidated, and only sound in damages^m.—Interest of an annuity being decreed by the lord Chancellor from the very day it became due, Mr. Peere Williams adds a query as to this, and says, it seems the arrears should carry interest only from the first day of payment next after the arrears of the annuity became due ; if payable half-yearly, then from the next half-year day ; if quarterly, then from the next quarter-day ; and so has been the common rule in these casesⁿ.—Where a man prays satisfaction for a simple contract debt, merely out of personal assets, a court of equity will of course direct the debt to be paid with interest, to be computed from one year after the testator's death^o.

Debts by simple contract, which are the last species of debts to be paid, are such where the contract upon which the obligation arises, is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any ; or by notes unsealed, which are capable of more easy proof, and therefore are only better than a verbal promise ; and this last species of debts may be branched out into a variety of obligations, through the numerous contracts for money which are not only expressed by the parties, but are virtually implied in law^p. Debts by

¹ 2 New Abr. 434. Swinb. 457, 458.

^o Barnard, 229. See more of interest on debts under Interest, in the Index.

^m 14 Vin. Abr. tit. Interest.

ⁿ 1 P. Will. 541.

^p 2 Black. Com. 466. 511.

And in a case where an executor pleaded two outstanding judgments, to each of which the plaintiff replied fraud, and traversed that the debts recovered were just debts, the replication was holden good on special demurrer ; the Court observing that the plaintiff might traverse the special matter, or rely on the fraud generally at his election. *Trethewy v. Ackland*, 2 Saund. 49.

simple contract, though postponed to all others, an executor or administrator is bound to pay as far as he hath assets ^q. Yet if no suit is commenced against him, he may pay one creditor in equal degree his whole debt, though he has nothing left for the rest: for without a suit commenced, the executor has no legal notice of the debt^r. And no action shall be brought, whereby to charge an executor or administrator, upon any special promise, to answer damages out of his own estate; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person, thereunto by him lawfully authorized^s (31).

As to the interest a man hath in an apprentice: it was held by *Holt*, chief justice, that by the custom of London, the executor of the master should put the apprentice to another master of the same trade; and that in other places it would be very hard to construe the death of the master to be a discharge of the covenants, though he admitted that the covenant for instruction had been considered as cancelled, but that he still continued an apprentice with the executor as to maintenance^t. And where a master received with an apprentice 250*l*. and died within two years, the apprentice during that time having been employed only in inferior affairs; it was decreed, after debts on specialties were paid, that the executors should repay 250*l*. as a debt due on simple contract, deducting after the rate of 20*l*. a year for the maintenance of the apprentice, during the time he lived with his

^q 2 New Abr. 434.

^r 2 Black. Com. 512.

^s Stat. 29 Car. II. c. 3. sect. 4.

^t 1 Salk. 66.

(31) To sustain an action against an executor or administrator on this statute, the whole agreement, that is, not the promise only, but the consideration on which it is founded, must be in writing. *Wain v. Warters*, 5 East, 10. *Saunders v. Wakefield*, 4 Barn. & Ald. 595. See also *Rann v. Hughes*, 7 T. R. 350. n.

master^v. — In an action of debt on bond, conditioned for Matthias Anderson's performance of the covenants in an indenture of apprenticeship, whereby he was bound to the plaintiff's testator, who was a mariner; the defendant pleaded that Anderson served faithfully to the death of the testator: the plaintiff replied, that since the death of the testator, Anderson had absented from her service; to which there was a demurrer. And after argument at bar, the chief justice delivered the resolution of the court, viz. that they were all of opinion the defendant should have judgment; and the executrix could maintain no such action. The binding was to the man, to learn his art, and serve him, without any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the lad is bound from a personal knowledge of the integrity and ability of the master^v. — In a late case, wherein it being contended that the contract between a master and his apprentice is merely personal and dies with the master; it was said by Lord Mansfield, that though an apprentice is not strictly assignable, nor transmissible, yet, if he continue, with the consent of all parties and his own, it is a continuation of the apprenticeship^x (32).

In respect to legal and equitable assets; if a man, possessed of a term for years, mortgages it, and dies, leaving debts, some by bond, and some by simple contract, the equity of redemption is equitable assets, and shall be liable

^v *Soam v. Bowden & Eyles*, Finch, 396.

^v *Baxter v. Burfield*, Str. 1115.

^x *The King v. the Inhabitants of Stockland*. King's Bench. Doug. Rep. 70. 2d edit. — Where the master becomes bankrupt, commissioners

recommend it to the creditors to allow the apprentice a gross sum out of the estate for the purpose of binding him to another master, which is considered as an indulgence and not a right. MSS.

(32) See 32 Geo. c. 57. by which some specific regulations are prescribed in the event of the death of the master of a parish apprentice, on whose binding no larger sum than 5*l*. shall have been paid.

to all the debts equally⁷. — A lease for years, or a bond, or grant of an annuity taken in a trustee's name, being personal assets, shall be applied in course of administration²; that is, as has been shewn. The distinction seems to be this; where there are legal assets, that is, assets which are liable at law without the help of equity, there the executor may apply them according to the course of law, which allows and requires the preference to be made as hath been mentioned; but where there are only equitable assets, that is, assets which are not liable, without the help of a court of equity, in such case, the court will direct the application thereof, according to that course which seems most equitable and just, that is, to pay every creditor his share in proportion³. So, where the assets are partly legal, and partly equitable, although equity cannot take away the legal preference on legal assets; yet where one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the court will postpone him till there is an equality, in satisfaction to all the other creditors, out of the equitable assets proportionable to so much as the legal creditor has been satisfied out of the legal assets⁴. Of which further mention will be made in treating on assets in a subsequent part of our work.

And now we shall return to the subject of paying debts with legal assets in such manner as the law requires. If one

⁷ 3 P. Will. 341.

² 2 Vern. 764. 3 P. Will. 342.

³ 4 Burn's Eccles. Law, 297. To determine the difference between *legal* and *equitable* assets, where land hath been devised for payment of debts, a distinction hath been made where the same persons that were trustees to sell the land were executors, and where they were not. The generality of the old cases determine that *money* arising by sale of land devised to, or subject to the power of executors, to sell for payment of debts and legacies, should

be *legal* assets in their hands (although they could not be charged with the value of the lands before sale). Yet some of the old cases, considering the devisee, &c. in the double character of trustee and executor, preferred the former; and consequently made the assets *equitable*; and the modern cases incline strongly to this construction; yet it seems that where an estate *descends* to the heir charged with the payment of debts, it will be legal assets. 2 P. Will. 416. note 2. 4th edit.

⁴ 4 Burn's Eccles. Law, 297.

that hath a debt due to him from the deceased upon a simple contract or the like, sue the executor or administrator for it, and there be debts due to others upon bonds and specialties, unsatisfied; in this case, the executor or administrator may not pay this debt, nor may he suffer the plaintiff to recover in his action; for if he doth, and he hath not assets besides to satisfy the debts due upon bonds and specialties, he must satisfy so much out of his own estate as he hath so paid, or suffered to be recovered from him; for then in case of an action brought, he is to plead and to set forth these debts upon specialties, and to say that he hath no more than what is sufficient to satisfy them; and thereby he shall bar the plaintiff in his action. In like manner it is, if one that hath a debt due to him from the deceased upon an obligation, sue the executor or administrator thereupon, and there be debts due to others upon judgments, statutes, or recognizances, and the executor or administrator suffer the plaintiff to recover the debt due upon the obligation, for want of pleading the judgments, &c., in this case he must pay so much out of his own estate, towards the satisfaction of the said debts due upon judgments &c., as he hath paid of the debt due upon the obligation. But here it must be observed, that no judgment or statute that is discharged, or is left and suffered to lie by agreement to bar others of their debts, shall be any bar to others that sue for their debts due upon obligation, &c.; and therefore if any executor or administrator shall plead such judgments, &c. in bar of any other debt sued for by any other creditor, the creditor may by special pleading set forth this matter of covin, and avoid the plea and bar of the executor or administrator^c.

In an action of debt against an executor, if the defendant plead fully administered, and any assets be found in his hands, although there be not to the value of the debt; yet the plaintiff shall have judgment for his whole debt of the

^c Shep. Touch. 457.

goods of the testator ^d (33). But if it be found that he had nothing in his hands, the judgment shall be, that the plaintiff shall take nothing by the writ, and shall not have judgment of the debt; for he hath waived this advantage by taking of the issue, and judgment is to be given upon the verdict^e.—Where a testator is much indebted, and the executor is desirous to be rid of the assets, his safest way is, to file a bill in chancery against the creditors, to the end they may, if they think fit, contest each other's debts, and dispute who ought to be preferred in payment ^f.

SECTION VI.

Of Accounting before the Ordinary.

By the statute of the 22 & 23 Car. II. c. 10. the ordinaries shall and may proceed and call administrators to account for and touching the goods of any person dying intestate, and upon hearing and due consideration thereof, order and make just and equal distribution of what remains clear (after all debts, funeral, and just expences, of every sort, are allowed and deducted); and the same distributions decree and settle, and compel such administrators to observe and pay the same, by the due course of his majesty's ecclesiastical laws: saving to every one, supposing himself or themselves aggrieved, their right of appeal, as has been always in such cases used. But by the statute of the 1 Jac. II. c. 17. sect. 6. it is provided, as was before mentioned,

^d 1 Roll's Abr. 929.

^f 2 Vern. 37.

^e *Ibid.*

(33) Or the plaintiff on such a plea may immediately take judgment of assets *quando acciderint*. *Noell v. Nelson*, 2 Saund. 226.

that no administrator shall be cited according to the ~~said~~ act of the 22 & 23 Car. II. c. 10. to render an account of the personal estate of his intestate (otherwise than by an inventory or inventories thereof), unless it be at the instance or prosecution of some person in behalf of a minor, or having a demand out of such personal estate as a creditor or next of kin, nor be compellable to account before any of the ordinaries or judges, by the said act empowered and appointed to take the same, otherwise than is aforesaid; any thing in the said act to the contrary notwithstanding. — The account must be passed before the same judge, or his surrogate or successor, that grants the administration.

If any person having interest shall call the administrator to exhibit a true, full, and perfect inventory of the goods of the deceased which have come to his hands, and to give an account of his administration thereof; he who is called in such case, is bound personally to exhibit such inventory and account, and (if the adverse party demand it) to take a corporal oath of the truth thereof^b. And as proofs made upon the account, at the instance of some one or more persons having interest, do not bind others who are not parties to the suit; therefore to prevent multiplicity of actions, it behoves the administrator, when he is cited by any one of the parties to render an account, to cite the next of kindred in special, and all others in general, having or pretending to have interest in the goods of the deceased, to be present, if they think fit, at the rendering and passing the account. And then upon their appearance, or contempt in not appearing, the judge will proceed to give sentence; and the account thus determined will be final^c.

An executor or administrator shall be allowed all reasonable expences, as well in law-suits, as for other honest purposes: And this reasonableness of expences to be such, as that he may receive thereby neither

^b Oughton's Ordo Jud. 345.

^c *Ibid.* 354.

profit (34) nor loss^k. And therefore he shall be allowed his expences in secular courts, over and above such costs as were allowed there^l.

In an action of debt upon a bond entered into by an administrator to the ordinary, upon taking letters of administration, the question was, Whether an administrator, by virtue of this obligation, was bound to go, and give in his account in the spiritual court without being cited? And by Holt, chief justice, who delivered the opinion of the court, 1. It appears by the statute of Edward III. that an executor was compellable to account before the ordinary, and so was an administrator; but that the ordinary was to take the account as given in, and could not oblige them to prove the items of it, nor swear to the truth of them. So it was if a creditor sued in the ecclesiastical court; for he had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant before the statute was compellable to prove the whole account; for the legatee had no other remedy, and the ecclesiastical court, which had a jurisdiction of legacies, could not otherwise do right: yet in such a case, if the executor would pay him, he could not sue further, for he had right done him, and the executor was not liable, but of necessity that right might be done. 2. A person entitled to distribution on the 22 Car. II. is in consequence entitled to sue for an account as a legatee was; for the next of kin is a legatee by the statute, and, as a statute legatee, shall have the same remedy as the other legatee might before the statute. The condition of an ad-

^k Lind. 178.

^l Floyer's Proctor's Pract. 37.

(34) It is a general rule that an executor or trustee is not entitled to a compensation for personal trouble and loss of time. *Burden v. Burden*, 1 Ves. & Bea. 170. *Brocksope v. Barnes*, 5 Madd. 90. If therefore the nature of the trust be such that an executor or trustee ought not to undertake it without remuneration, a special case must be made in a court of equity, before the trust is accepted, in order to induce a relaxation of the general rule. See *Marshall v. Holway*, 2 Swanst. 432.

ministration bond was, to account when required ; therefore he was not to account before he was legally cited, which could not be *ex officio* ; and therefore the statute of Jac. II. whereby the ordinary is prohibited from citing him *ex officio*, had really no effect at all, for the law was so before : but since the statute of Car. II. the condition of administration bonds being, that he account at a day certain, he must account accordingly at his peril, and that without citation or suit ; and this account must be in court ; and if he comes at the day and no court is held, he shall be excused ; for he may plead he was there ready, and no court held. But then this account is not examinable, unless a party interested comes and controverts it ^m.

It is said the ordinary hath but a lame jurisdiction, and there being no negative words in the statute of Car. II. a bill for distribution properly lies in chancery ⁿ. And where the surplus of the personal estate for want of distribution by a will is distributable, there can be no suit for it in the spiritual court ^o.—Where a man died intestate, and his widow took out letters of administration to him ; the intestate's brother cited the widow into the spiritual court, to make distribution of her deceased husband's estate. The widow there suggests, that the brother had goods of the intestate in his hands to the value of 200*l*. And upon this the spiritual court orders him to bring the 200*l*. into court, to the end it may be distributed. And for not bringing it in, they excommunicate him. Upon which he moves in the King's Bench for a prohibition ; and it was granted as to the whole process that compelled him to bring in the 200*l*. For by the court, the spiritual court hath power to make distribution of the estate, when it comes in, but not to fetch it in ; because that is to hold plea of debt ; but the spiritual court might refuse in this case, to proceed to distribution, until the brother had brought in the 200*l*. but they cannot excommunicate him for not bringing it in ^p.

^m 2 Salk. 915.

ⁿ 2 Vern. 362.

^o 5 Mod. 247. Str. 865.

^p Clerke and Clerke, L. Raym. 585.

CHAPTER III.

OF MAKING DISTRIBUTION.

By the statute 22 & 23 Car. II. c. 10. after debts and funeral expences are paid, the surplusage of intestates' estates (except the estates of *femes covert*; that is, married women, to which their husbands have a right as before mentioned) shall, after the expiration of one full year from the death of the intestate, be distributed in the following manner: one-third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if the children be dead, to their representatives, that is, their lineal descendants. But no child of the intestate (except his heir at law) on whom he settled in his lifetime any estate in lands, or pecuniary portion equal to the distributive shares of the other children, shall have any part in the surplusage with their brothers and sisters; but if their estates, so given them by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal' (1). But the heir at law shall

2 Black. 515, 516.— If the intestate husband covenanted to leave his wife a certain sum; and her distributive share comes to above that sum, the latter is a satisfaction; and this hath been considered rather a performance than satisfaction of the covenant. 1 P. Will. 324. Note 1. 4th edit. But where there was a proviso in a settlement that the wife

should not be barred of any thing a husband should give or leave by deed or will, and he died intestate, and a freeman of London; it was held, that the wife's shares by the statute and custom were not a satisfaction of the covenant contained in the settlement. *Kirkman v. Kirkman*, 2 Bro. Cha. Rep. 95. (2).

(1) This statute applies only to the case of actual intestacy; for where there is an executor and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them. Therefore in such a case, a child advanced by her father in his lifetime, cannot be called upon to bring her advancement into hotchpot. *Walton v. Walton*, 14 Ves. 324.

(2) The rule is, that if, on a division of the covenantor's

have an equal part in the distribution with the other children, without any consideration of the value of the land, which he hath by descent, or otherwise, from the intestate.

By this statute the heir at law shall not abate, in respect of the land which he hath by descent, or otherwise, from the intestate; yet if he hath had an advancement from his father in his lifetime otherwise than by land as aforesaid, he shall abate for the same in like manner as the other children. And so it seems that *coheiresses* shall bring together into hotchpot such advancement (not being lands) as they shall respectively have received from their father, before

property under the statute of distributions, either in the case of an absolute or a *quasi* intestacy, a portion *equal* in amount to the stipulated sum devolves to the party claiming by the covenant, that is a satisfaction, or, more properly, a performance of the covenant; but when the portion is *inferior* in amount, it is considered a part performance. *Blandy v. Widmore*, 2 Vern. 709. *Lee v. Cox*, 3 Atk. 419. S. C. 1 Ves. Barret v. Beckford, 1 Ves. 519. *Richardson v. Elphinstone*, 2 Ves. jun. 463. *Garthshore v. Chalie*, 10 Ves. 1. *Goldsmid v. Goldsmid*, 1 Swanst. 211.—Lord Eldon, in *Garthshore v. Chalie*, considered that the instrument is to be construed with reference to the circumstance, that there is a claim upon the property independent of the covenant; and that where a husband covenants to leave or pay, at his death, a sum of money to a person, who, independent of that engagement, by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to that circumstance. The cases which have established this doctrine, though they have never been in terms impugned or shaken, appear not to have met with entire approbation. But as no case on which the question of satisfaction of a covenant to provide for a wife has occurred in a case of *testacy*, that question still remains open; and as a legacy given by a will *prima facie* imports bounty, it would perhaps admit a presumption of an intention in the testator to augment the provision in the settlement, and not to satisfy or perform it. See *Haynes v. Mico*, 1 Bro. C. C. 129. *Devese v. Pontet*, 1 Cox, 188.

they shall be entitled to recover their several distributive shares, agreeable to the general purport of the act; which is evidently to promote an equality as much as may be^s.

This word *hotchpot* is generally understood to signify mixing and blending together, and conveys much the same idea as the words *collatio bonorum*^t, which in the civil law is answerable to the word *hotchpot*, and signifies, that if a child advanced by the father, doth after his father's decease, challenge a child's part with the rest, he must cast in all that he had formerly received, and then take out an equal share with the others^u.

In respect to borough-english lands, which by custom descend to the youngest son, as we shall again see in the ensuing chapter, it became a point upon the statute of distributions, whether the youngest son (to whom the land descended by the custom of borough-english) should abate for these lands, or should be considered as an heir at law, who by the statute is to have a distributive share, without any allowance for lands by descent. And it was ruled by Sir Joseph Jekyll, master of the rolls, that he should allow for these lands^v. Yet where a man was possessed of a personal estate, and seised of a copyhold in fee, which was in the nature of borough-english, and the question was, whether the youngest son, upon whom the copyhold descended, should have an equal share with the other children of the personal estate, exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children. By Lord Chancellor Talbot: The heir at law is the eldest son, and not the heir in borough-english; and the exception in the statute extends only to the eldest son. Yet nevertheless the youngest son, who is heir in borough-english, shall not bring the borough-english estate into hotchpot, there being no law to oblige him to do this, but only this statute, and there are no words in the statute that require it;

^s 4 Burn's Eccles. Law, 332.

^t 2 Black. Com. 190.

^u Jac. Dict. tit. Hotchpot, 10th edit.

^v Str. 935.

for the statute speaketh only of such estate as a child hath by settlement, or by advancement of the intestate in his lifetime. And it was decreed that the youngest son should have an equal share with the other children, without regard to the value of the borough-english estate. And the former case coming after this before the Lord Chancellor Talbot, he reversed the decree of the master of the rolls, and decreed agreeably to this latter case^x.

In respect to what shall be an advancement, so as to come within the meaning of the statute, we may observe, it hath been determined, that small inconsiderable sums, occasionally given to a child, cannot be deemed an advancement or part thereof. Thus, maintenance money, or allowance made by the father to his son at the university, or in travelling or the like, is not to be taken as any part of his advancement, this being only his education; and it would create charge and uncertainty to enquire minutely into such matters. — So, putting out a child apprentice, is no part of his advancement; for it is only procuring the master to keep him seven years instead of the parent. But the father's buying an office for the son, though but at will, as a gentleman pensioner's place, or a commission in the army, these are advancements *pro tanto*, that is, for so much^y. And a provision made by a marriage settlement, although it is in the nature of a purchase^z, is such an advancement as that a child claiming a distributive share, shall first bring the said advancement into hotchpot. As where the father, on his son's marriage, covenanted, in case of a second marriage, to pay the first son by the first wife 500*l*. There was a son, and several other children of the first marriage. The father of these children died intestate; and by the court it was agreed, that the heir must bring the 500*l*. into hotchpot, although in nature of a purchaser under a marriage settle-

^x Cas. Talb. 276.

^y 3 P. Will. 317.

^z Purchase means any method of acquiring an estate other than by descent. 1 Black. Com. 214.

And where a person takes any thing from an ancestor or others, by deed, will, or gift, and not as heir at law, this is a purchase. 2 Lill. Abr. 497.

ment^a. So where a man on his marriage entered into articles, in consideration of the marriage, and of 4000*l.* portion, to settle an estate to raise portions for daughters, in case there were no sons; that is to say, if but one daughter, the sum of 5000*l.*; if two or more, then the sum of 6000*l.* equally amongst them, to be paid at their respective ages of 18 years, or days of marriage, which should first happen; and 80*l.* a year maintenance in the meantime to each daughter. The marriage took effect; and they had issue one daughter only, and no son. Then the wife dies. Afterwards the man marries a second wife, and had by her a son and a daughter, and died intestate, leaving a personal estate to the amount of 20,000*l.* The daughter by his first wife, at that time was about 12 years of age; and some time after married one Mr. Edwards; and they brought their bill, to have an account of the personal estate of the wife's father, and their distributive share thereof. And the only question was, whether the 5000*l.* should not be looked upon to be so far an advancement of the plaintiff, the wife of Mr. Edwards, that if she would have any farther share of her father's personal estate, they must bring this 5000*l.* into hotchpot. And the court, consisting of King lord chancellor, assisted by Raymond chief justice, and the master of the rolls, and Price and Fortescue justices, were all clear of opinion, that this was an advancement by the father in his lifetime, within the meaning of the statute, though contingent and future; so that she could not have that and her distributive share likewise. And accordingly the decree was pronounced^b.

If the father settles a rent out of his lands upon a younger child, this is an advancement; so likewise if he by deed settle an annuity upon a child, to commence after his death, this is an advancement for so much (3): and by the same

^a 2 Vern. 638.

^b *Edwards and Freeman*. 1 Abr. Eq. Cas. 249.

(3) The value of an annuity when brought into hotchpot is the amount of what it was worth at the time it was granted, 8 Ves. 63.

reason, a reversion settled on a child as it may be valued, is an advancement also^c. And if a child who has received any advancement from his father, shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share, without bringing their father's advancement into hotchpot; as where a father had several children, and in his lifetime advanced one of them. The child, thus advanced in part, died in his father's lifetime, leaving issue. Afterwards the father died intestate, possessed of a considerable personal estate. It was ruled, that the issue of the dead child must bring into hotchpot what their father received in part of advancement, as he, if living, must have done; as that the issue stands in the place and stead of the father, claims under him, and cannot be in a better condition than the father, if living, would have been, and had claimed his distributive share^d. — A child, partly advanced, shall bring in his advancement only amongst the other children; so that the wife shall have no advantage of it^e. — It is said that whatever a child receives out of the mother's estate should not be brought into hotchpot. As in the case of *Holt and Frederick*, 2 Peere Williams, 356. *Martha Frederick*, who married one *Holt* and survived him, had three children, two sons and a daughter, and having out of her own estate given 1000*l.* to her daughter in marriage, died intestate, leaving those three children; and the question was, whether the daughter who had received this 1000*l.* from her mother, ought to bring it into hotchpot, before she should receive any farther share of her mother's personal estate. The lord chancellor King said, It weighed with him, that the act of distribution was grounded upon the custom of *London*, which never affected a widow's personal estate; and that the act seems to include those within the clause of hotchpot, who are capable of having a wife as well as children, which must be husbands only. And so in this case (without much debate) his lordship ruled, that the

^c 2 P. Will. 141. 442.

^d 2 P. Will. 560.

^e 4 Burn's Eccles. Law, 339.

daughter should not bring the 1000*l.* which she had received in her mother's lifetime, into hotchpot (4).

By what has been said, it may be perceived, that where the intestate leaves a widow and children, or the representatives of children, one-third of his personal estate shall go to his widow (5), and the residue to his children; or if dead, to their representatives, that is, their lineal descendants, such of the children, or the representatives of such of them, as have been advanced as aforesaid, first bringing such advancement into hotchpot, in case they choose to claim their distributive share; and of such advancement, when the same shall be so brought into hotchpot, the widow shall have no advantage. Now we may consider how the residue of the intestate's estate is to go to his children, or if dead to their

(4) Money laid out by the intestate on repairs of houses, which descended to his eldest son, as heir, is not an advancement, but it would have been so if the father had first vested the estate in his son, and had afterwards given him the money to improve it. 5 Ves. 721. A provision which a father may make for his child by will (for a case may occur where a testator may die intestate as to part of his personal estate) is not considered in the light of an advancement; nor is land given by the father's will to a younger child. 2 P. Wms. 440. 446. Neither is property given or bequeathed to the child by any other person to be denominated an advancement. 3 Bac. Abr. 76. A provision which operates as an advancement, must result from a complete act of the intestate in his lifetime, by which he divested himself of all property in the subject, though it may not take effect in possession until after his death. 2 P. Wms. 440. The use of furniture for life has been regarded as an advancement *pro tanto*. Com. Dig. Administration, (H). Fitzg. 285.

(5) A widow takes as widow by the express words of the statute, and not as being of kin; for neither a wife nor a husband are, as such, of kin to each other. *Worsley v. Johnson*, 3 Atk. 761. *Bailey v. Wright*, 18 Ves. 54. A widow may be excluded from any distributive share by the statute, if by settlement a jointure is limited to her in bar of all her demands out of the estate of her husband, by virtue of custom or otherwise. 1 Vern. 15.

representatives, that is, their lineal descendants. And here we may observe, the doctrine and limits of representation, as laid down in the statute of distributions, seem to have been principally borrowed from the civil law ; whereby it will sometimes happen that personal estates are divided *per capita*, as when every claimant claims in his own right ; and sometimes *per stirpes*, as when the claimants claim by representation, or in the right of another. They are divided *per capita* to every one an equal share, when all the claimants claim, in their own rights, as in equal degree of kindred, and not by representation in the right of another person^f. That this may be rightly understood, let us first suppose, That neither of the intestate's children hath died leaving children. 2. That the intestate's children are all dead ; whether they were two, or three, or more ; each of them having left children ; as it may be, one of them two, another three, or more. 3. That some of the intestate's children are living, and some dead ; and that those who are dead have each left children.

As to the first supposition, it is sufficiently clear, that if neither of the intestate's children hath died leaving children, the residue as aforesaid, or the remaining two-thirds, after the wife has had her third, shall be equally divided between all the children of the intestate ; as in this case they all claim in their own right : and where a man marries a woman, and hath issue by her, as it may be, sons and daughters, and the wife dying, he marries another woman, by whom he hath also sons and daughters : now these, though they are called brothers and sisters, are but brothers and sisters of the half-blood ; because they had not both but one father and mother : yet between these no distinction is, or (as I conceive) ever was made ; but in respect to collaterals, who may take where there are no lineal descendants ; there are several precedents of judgments given since the statute, allowing the half-blood to have but an half-share : but now these are upon the same footing with the whole blood, in respect to

^f 2 Black. Com. 517.

^g Terms de Ley.

what they are entitled to in the distribution of personal estate^h. Yet in respect to real estate, the whole blood is always preferred, and the half-blood is no blood inheritable by descent, as we shall see in the ensuing chapter. Where a father leaves behind him one or more children, and his widow shall happen to be with child, the child in the mother's womb will be reckoned among the children of the deceased; and if the other children should proceed to a partition of the estate, it will be necessary to lay aside one share for the child that is to be born, and to name a curator to it, who may take care of its interestⁱ. But this provision is rendered more effectual by the statute; which, as we have seen^k, requires that no distribution shall be made till after the expiration of one year from the intestate's death, within which time the child will be born.

As to the second supposition, as that the intestate's children are all dead, whether they were two or three, or more, each of them having left children, as it may be one of them two, another three, or more; in this case, where there be only grandchildren, their fathers or mothers respectively having died in the lifetime of their grandfather, the grandchildren take in their own right, and not by representation of their father or mother deceased; and the courts, where distributions are cognizable, will order an equal distribution to be made^l. And thus it would be, if there were only great-grandchildren of the intestate, both his children and grandchildren having all died before him.

As to the third supposition, as that some of the intestate's children are living, and some dead, and those that are dead have left children; in this case, the grandchildren take by representation, and not in their own right, and the issue of each deceased child stand in the place and stead of their deceased parent. As suppose the intestate to have had three children, A, B, and C, and one of these children to be dead, as it may be A, leaving three children; and another

^h 4 Burn's Eccles. Law, 357.

ⁱ 1 Strah. Dom. 624.

^k Page 84.

^l 4 Burn's Eccles. Law, 347.

dead, as it may be B, leaving two; then the distribution must be one-third to A's three children, and another third to B's two children, and the remaining third to C, the surviving child. But if C had also died, and left no issue, then A's and B's five children, being all in equal degree of kindred, would take in their own right, each of them an equal share, in like manner as is just before mentioned under the second supposition.

By this we may perceive in what manner the intestate's personal estate is to be distributed, where he has left a wife and children, or representatives of children. But before we conclude this, and proceed to another part of the statute of distributions, it may be proper to observe, that if the intestate leaves but one child, or the representative, that is, the lineal descendant of one child, such one child, or the representative of such, will be entitled to the same share in the distribution, as if there were more than one; for where there is only one person that can take, the statute vests the right in that person^m. And although by the statute, no distribution is to be made within a year; yet the right of the distributive share vests immediately on the intestate's death. As where a person, intitled to a distributive share of an intestate's estate, died within a year after the intestate, it was decreed that the share of the deceased person was an interest vested and transmissible to his executors or administrators; for in this sense the statute makes a will for the intestate, and it is as if a legacy was bequeathed payable a year hence, which would plainly be an interest vested presentlyⁿ.

By the statute 22 & 23 Car. II. c. 10. sect. 6. In case there be no children, nor any legal representatives of them, then one moiety of the intestate's estate is to be allotted to the wife of the intestate; and the residue to be distributed to every the next of kindred of the intestate, who are in equal degree, and those who legally represent them.

By sect. 7. No representation is to be admitted among collaterals after brothers' and sisters' children^o. And in case there be no wife, then all the said estate is to be distributed

^m 2 P. Will. 50.

ⁿ 3 P. Will. 49.

^o See this explained, post.

to and amongst the children. And in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives, as aforesaid.

Hence we may perceive, that where the intestate leaves no child, or any legal representative of a child, that is, lineal descendant, there the wife has a moiety, or one half of his personal estate; and if there be no wife, then all the estate is to be distributed amongst the children; and if there be no child, then amongst the next of kindred in equal degree of or unto the intestate. But if there be a child or representative, that is, lineal descendant, then the next of kindred will be totally excluded. For if a person dies intestate, leaving a descendant of either sex, or of whatsoever degree, such descendant is to be preferred to all ascendants and collaterals; and herein agree the civil, canon, common, and statute laws^p. So if there be children, or representatives of children, and no wife, we must observe what has been before said respecting children that have been advanced, bringing such advancement into hotchpot; and then how the estate is to go to the intestate's children, or if dead, to their representatives; as here distribution must be made of the whole personal estate, in the same manner as, where there is a wife, distribution must be made of two-thirds^q.

Thus, having proceeded as far as relates to the intestate's widow and children, before we enter any farther into the statute of distributions, we may take notice of the statute of 1 Jac. II. c. 17. whereby it is enacted, that if after the death of a father, any of his children should die intestate, without wife or children, in the lifetime of the mother; every brother and sister, and the representatives of them, shall have an equal share with her. Before this statute, if a child had died intestate, without a wife, child, or father, the mother would have been intitled to the whole personal estate^r; as the father surviving is at this day^s; and the reason of making this statute was, because the mother might marry and carry

^p 4 Burn's Eccles. Law, 348.

^q See page 90—93.

^r 4 Burn's Eccles. Law, 349.

^s 2 P. Will. 48.

away all to another husband¹. Upon this statute it has been determined, that where, after the death of the father, the son died intestate without issue; but leaving a wife, a mother, three brothers, a sister, and two nieces, the children of a deceased brother; that this is within the statute, and that the intestate's wife shall have but one moiety; and as to the other moiety, the intestate's brothers and sisters, and the two nieces, shall come in for an equal share with the mother². But if there be no brother or sister, or representative of brother or sister, then it is out of the statute, and the mother shall have the whole, as she had before the making of it³. Hence it is obvious, that if a child dies without issue, then comes in the father; if the father be dead, then comes in the mother, brothers, and sisters; but, if there be no brother or sister, or representative of a brother or sister, which must be a child or children (as has been determined upon the construction of the statutes of Car. II.⁴, and it is the same in respect of this statute of Jac. II.⁵); then the mother takes the whole, or the half where there is a wife, and the whole where there is no wife: as the father always doth if living, and that in exclusion of the intestate's brothers and sisters, and their children. — A brother or sister of the half blood shall have an equal share with those of the whole blood⁶. And upon the construction of the statute of Car. II. it has been determined that a *posthumous* brother or sister, or brother or sister born after the father's death, shall share equally with the other brothers and sisters⁷. But upon the construction of this statute of Jac. II. it was a question whether

¹ 1 Salk. 251.

² 2 P. Will. 344.

³ 4 Burn's Eccles. Law, 362.

⁴ See post.

⁵ *Stanley and Stanley*, 1 Atk. 458.

⁶ Com. Dig. Administration (H).

⁷ *Burnet and Man*, 1 Ves. 156.

(6) In a late case, under a limitation by settlement "to the next of kin of A. B. of her own blood and family, as if she had died sole and unmarried," it was held that the whole and the half blood took together, as under the statute of distributions. *Cotton v. Scarancke*, 1 Madd. 45.

a *posthumous* sister was entitled to a share of her brother's personal estate equally with her mother? and after many arguments had thereon, lord chancellor Hardwicke decreed for the *posthumous* sister^b.

In respect to how distribution is to be made between the intestate's mother, brother, and sisters, we may observe that each of these share alike; as where a man died intestate, and without issue, leaving a wife and several brothers and sisters, and his mother living, the wife, under the statute of Car. II., takes a moiety; and a question arising upon the statute of Jac. II. how the other moiety should be distributed, whether the mother should have the whole, or only a distributive share with the brothers and sisters; a bill was brought, in order to have the opinion of the court. Upon a hearing, the lord chancellor King was clearly of opinion, and decreed, that the mother should have no more than a share of the other moiety, with the brothers and sisters of the intestate; for the intent of the statute was to put the mother (who before stood upon the same footing with the father) in the same state and condition with those collaterals; so that whenever she is intitled, they shall have an equal share with her^c. But where a man died intestate, leaving a wife and a mother living, and children of a brother deceased; these children, as representatives of their father, bringing a bill to have one half of the moiety of the intestate's estate, the wife being entitled to the other moiety, and the mother (as they insisted) to have only an equal share with them: lord chancellor Hardwicke ordered the residue of the intestate's estate, after satisfaction of debts, to be divided into four equal parts; two-fourth parts thereof to go to the widow, one-fourth to the mother, and one-fourth to the brother's children^d. — If a brother or sister is living, and also children of a deceased brother or sister, such children will take *per stirpes*.

Having proceeded thus far with the statute of 1 Jac. II.

^b *Wallis and Hodson*, 4 Burn's Eccles. Law, 365.

^c *Keilway and Keilway*, Str. 710.

^d *Stanley and Stanley*, 1 Atk. 458.

we may now return to that part of the statute of distributions that relates to collaterals, and the intestate's next of kindred in equal degree, so proceed gradually from the nearest to the most distant relations; and here we may first take notice of what is said relative to collaterals, and then, of what is said relative to the intestate's next of kindred, in equal degree. As to collaterals the statute says, "There is 'no representation admitted among collaterals after brothers' 'and sisters' children.'" Upon these words of the statute, where the question was, Whether these words were intended of brothers and sisters to the intestate, or whether, when distribution falls out amongst brothers and sisters though remote relations to the intestate, representation should be admitted amongst them? it was held, that representation should only be between the brothers and sisters to the intestate^e. And this representation amongst brothers and sisters does not extend to their grandchildren. For where the persons claiming distribution were a deceased brother's daughter, and the grandchildren of another deceased brother; it was held that the deceased brother's daughter only was intitled; and that a deceased brother's or sister's grandchildren should not come in with a deceased brother's or sister's children^f. And as to representation among other relations; where a man died without wife or child, brother or sister, and his next of kin were an uncle by his mother's side, and a deceased aunt's child; upon a demurrer, the court of chancery allowed the uncle to have the whole, and the deceased aunt's child nothing^g; and though this may seem hard, yet, as the lord chancellor said in this case, so is the law.

As to the part of the statute where it is said, "The next 'of kindred in equal degree of or unto the intestate, and their 'legal representatives;" by what has been just mentioned it may be perceived that these words, "their legal representatives," are wholly confined to the intestate's brothers

^e *Maw and Harding*, 2 Vern. 233.

^f *Pett and Pett*, 1 P. Will. 25.

¹ *Salk.* 250.

^g *Bowyer and Littlewood*, 1 P.

Will. 594.

and sisters, and that no representation is admitted among collaterals after brothers' and sisters' children; by which the number of persons intitled are less than they otherwise would be.—We may now consider, who are those next of kindred in equal degree of or unto the intestate, that may be intitled to his estate? and here we may observe, that kindred are distinguished either by the right line or by the collateral. The right line is of parents and children, computing by ascendants and descendants; the collateral line is between brothers and sisters, and the rest of the kindred, among themselves. Those of the right line are reckoned upwards as parents or downwards as children; those of the collateral line are reckoned *ex transverso*, or sideways, as brothers and sisters, uncles, and aunts, and such as are born from them^h. Amongst those there are different degrees of kindred which are differently reckoned by the civil and canon laws, yet in the ascending and descending lines, the degrees are the same by both laws; but in the collateral line they differⁱ. And for the distribution of personal estate, those degrees of kindred are reckoned according to the computation of the civil law; and not of the canon law, which the law of England adopts in the descent of real estate^k. In the descending line, the son is in the first degree, the grandson in the second, and the great grandson in the third. In the ascending line, the father is in the first degree, the grandfather in the second, and the great grandfather in the third. In the collateral line, as reckoned according to the computation of the civil law, we ascend first to the father, which is one degree; from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german, or uncle's child, which is the fourth degree. So again we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which

^h Ayliffe's Parergon. 327.

^k 2 Black. Com. 504.

ⁱ 4 Burn's Eccles. Law, 343.

is the third degree; and from the nephew to the son of the nephew, which is the fourth degree¹.

How some of those degrees of kindred will be entitled to the intestate's personal estate, will be seen by the following adjudged cases; which, after being related, some observations will be made concerning the persons who will be intitled to such personal estate, pursuant to the statutes of 22 & 23 Car. II. and 1 Jac. II. and thereby we may have a brief and comprehensive view of them.

In many cases where it hath happened, that the next of kindred to the intestate were a grandfather and a brother; suits have been commenced to determine their right; but now this point seems to be fully determined, in consequence of three determinations, the first of which was in the case of *Pool and Wilshaw*, T. 1708. The second in the case of *Norbury and Vicars*, before Fortescue, Master of the Rolls, M. 1749; and the third was delivered by Lord Chancellor Hardwicke, in the case of *Evelyn and Evelyn*, H. 1754, and determined in favour of the brother, in exclusion of the grandfather. In delivering the determination of the court in this case, by Lord Chancellor Hardwicke: This case is between the grandfather and brother of the deceased. It is insisted on behalf of the grandfather, that he is in equal degree of consanguinity with the brother of the deceased, and intitled to an equal share of his estate, under the statute of distributions. The statute says, that the ordinary (in case there shall be no wife, children, or children's children) shall make a just and equal distribution among the next of kindred to the dead person, in equal degree, or legally representing their stocks, *pro suo cuique jure*, "according to the laws in such cases, and the rules and limitations hereafter set down." Which limitation is only a particular specification, and in what cases representation shall be allowed; and there is nothing more expressed in the statute than that the estate shall be distributed equally to every

¹ 4 Burn's Eccles. Law, 348.

the next of kin to the intestate, who are in equal degree.— This point has been already twice determined in courts of equity. First in the case of *Pool* and *Wilshaw*, and afterwards in the case of *Norbury* and *Vicars*. But it has been insisted on for the grandfather that both these decrees are erroneous. Notwithstanding I shall adhere to the determination of the case of *Pool* and *Wilshaw*. I have seen the Lord Chief Baron Ward's and Mr. Baron Price's reports of this case; and also that of Mr. Dodd (afterwards Chief Baron). The last of which, though but short, is the clearest of the three. It was a bill brought by the grandmother, for a share of her grandson's estate, equally with his brother. And it was insisted on for her, that she was in equal degree of consanguinity, and equally intitled; but the reporter says, "All the court contrary, and there has been no such usage since the making of the statute." And I know of none since; though it is eighty-three years since that statute was made. The subsequent decree at the rolls was conformable to this; and therefore I shall not attempt to overthrow these determinations. And after a full discussion of the subject, the Lord Chancellor concludes, by saying, that since not only the reasons are on this side the question, but the determinations have been that way, and to overthrow them would tend to introduce inconveniences, as it might disturb distributions already made, which is an argument of the greatest weight in the law, I shall determine this point in favour of the brother, to the exclusion of the grandfather ^m.

Where the intestate leaves a grandmother and an aunt, the grandmother will be intitled in exclusion of the aunt; and as to this, Lord Chief Justice Holt said, that as by the common law father and mother were nearer than brother and sister, so grandfather and grandmother are nearer than uncle and aunt. And the grandmother is the root of the kindred, whereas the aunt is only a branchⁿ. So in a cause in the

^m 4 Burn's Eccles. Law, 351. The case of *Evelyn v. Evelyn* is now reported by Mr. Ambler in his reports of 1790.

ⁿ *Blackborough* and *Davis*, 1 Salk. 38. 351. 12 Mod. 623. 1 P. Will. 51.

court of chancery, it was clearly agreed, that if one dies intestate, leaving a grandmother and uncles and aunts, the grandmother is intitled to the personal estate, in exclusion of the uncles and aunts^o.—Where the next of kindred to the intestate were a grandfather by the father's side, and a grandmother by the mother's, it was decreed, that they shall take in equal moieties, as being in equal degree; for though the grandfather by the father's side may in some respects be more worthy of blood, yet in this respect dignity of blood is not material^p; though it is in respect of the descent of lands, as we shall see in the ensuing chapter.—Where the intestate left two aunts, and a nephew, and a niece, children of a deceased brother, Lord Chancellor Hardwicke ordered the surplus to be divided into four parts equally amongst them, they being all in equal degree^q, and therefore the children do not take by representation, but in their own right; but if the father of the nieces had been living, he would have taken the whole.

Here, as was proposed, we may observe, who those persons are that will be entitled to the intestate's personal estate, pursuant to the statutes of the 22 & 23 Car. II. and 1 Jac. II. As in the first instance, where a man dies leaving a wife and children; the wife has a third, the children and the representatives of deceased children the other two-thirds. 2. If there be no wife, the children, and representatives of deceased children, have the whole; and that in exclusion of all ascendants and collaterals whatever. 3. In case there be no child or representative of any child, that is lineal descendant; then the wife has always one half, whoever has the other half. 4. If there be no wife nor lineal descendant, then the intestate's father, if living, has the whole. 5. If the father be dead, then the intestate's mother, brothers and sisters, and the children of the deceased brothers and sisters (if any), have the whole. 6. If there be no brother or sister of the intestate, or child of a brother or

^o *Woodroffe and Wickworth, Prec. Cha.* 527.

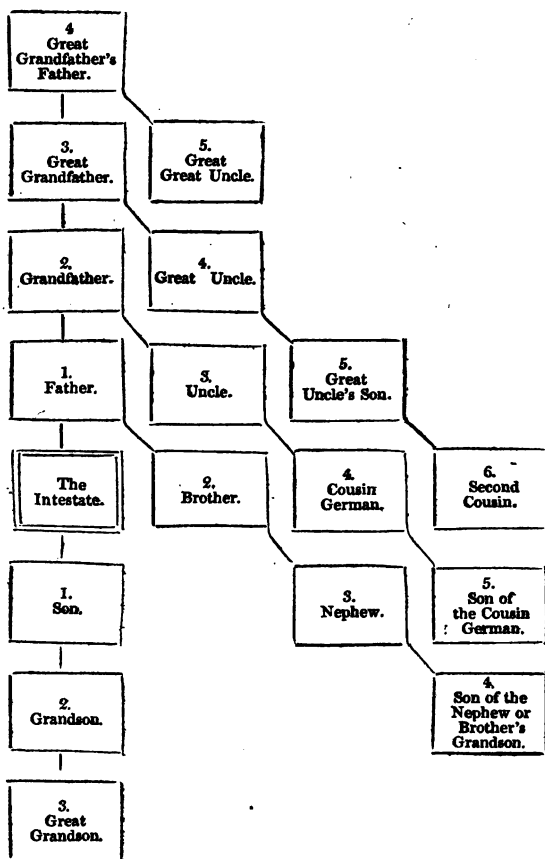
^p 1 P. Will. 53.

^q *Durand and Prestwood, 1 Atk.* 455.

sister, then the mother has the whole. 7. Where the deceased leaveth neither wife nor child, nor representative of such child, nor father, nor mother; but leaves brothers and sisters, and children of other brothers and sisters deceased; the brothers and sisters, and the children of the brothers and sisters deceased, have the whole, and the children of the brothers and sisters deceased take *per stirpes*, and not *per capita*; for the children of the deceased, being not equal in degree with their uncles and aunts, do take in this case, not in their own rights, but by way of representation of their parents deceased. As if there had been three brothers of the deceased, A, B, and C; and A had died, leaving three children, and B leaving two; the distribution must be one-third to A's three children, another third to B's two children, and the remaining third to C the surviving brother. But if the three brothers had all been living, then the intestate's estate must have been divided into three equal portions, and distributed *per capita*, one to each, as has been said concerning the intestate's children and grandchildren. Where all the brothers and sisters of the intestate are dead, some having left children, as it may be, some a greater, others a less number; those children of the brothers and sisters deceased, take *per capita* each an equal share, as has been observed before respecting the intestate's grandchildren. 9. If a person die intestate, leaving neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, but hath a grandfather or grandmother living; then the grandfather or grandmother has the whole personal estate, in exclusion of the intestate's uncles and aunts; and if there be a grandfather on the father's side, and a grandmother on the mother's side, the whole is divided between them; and so it is if there be a grandmother on the father's side, and a grandfather on the mother's side. 10. If a person die intestate, leaving neither wife nor child, nor representative of such child, nor father nor mother, nor brother nor sister, nor grandfather nor grandmother, but leaving uncles and aunts, and brothers' or sisters' children; those uncles and aunts, whether on the

father's side or mother's, will share the intestate's whole personal estate, together with his brothers' and sisters' children.

If a person die intestate, leaving none of those relations, the general rule by the statute of distributions is, that his personal estate shall go to his next of kindred in equal degree; and those may be the children of his uncles or aunts, and his brothers' or sisters' grandchildren, all of whom, being in the fourth degree, will share equally alike; and if there is but one person that can take, as being the only person who is the nearest of kin, the statute vests the whole in that person.—For further discovering the degrees of kindred, when none of those that have been mentioned are to be found, we may observe the following table, which is laid down conformable to what has been before mentioned respecting the mode in which the different degrees of kindred are to be reckoned. We may likewise observe, that where there are relations, both by the father's side and mother's, in equal degree of kindred, they shall share equally alike; for here there is no difference (though there is in respect of real estate, as will be seen in the ensuing chapter), whether the relations be by the father's side or by the mother's: but those who are nearest of kin will be preferred, be it by either side; and the half-blood will be equally intitled with those of the whole blood.



If the intestate have no kindred, his real estate, which will be the subject of our ensuing chapter, will escheat to the king, or to the lord of the manor, or other person entitled thereto, by virtue of any grant from the crown; for where no person can claim any property, there the king shall be entitled by his prerogative. As to personal estate, concerning which we have been treating; where a bastard who has no kindred, being as the law terms him, *nullius filius*,

that is, the son of no one, or as he is sometimes termed, *filius populi*, that is, the son of the people, (or any one else that has no kindred,) dies intestate, and without wife or child, it hath formerly been held, that the ordinary might seize his goods, and dispose of them in *pios usus*, or in pious uses. But the usual course now is, for some one to procure letters patent or other authority from the king; and then the ordinary of course grants administration to such appointee of the crown^a (7).

Hence it may be perceived, that a bastard is utterly incapable of taking any real estate by descent, and that he cannot be heir to any one; neither can he be entitled to any share in the distribution of an intestate's personal estate; when born he is capable of taking by devise, and the lawful issue of a bastard is capable of inheriting or taking by descent or otherwise such estate as the parent might die possessed of, but no person except his wife or lawful issue can claim any part of his estate as kindred; for he can have no collateral kindred. — Bastards are children born out of wedlock, or before matrimony; but if a child be begotten while the parents are single, who afterwards marry, and thereby the child is born in lawful wedlock, he is no bastard^c. And children born so long after the death of the husband, that by the usual course of gestation, they could not be begotten by him, are bastards. But this being a matter of some uncertainty, the law is not exact as to a few days^u (8). So

^a 2 Black. Com. 505. Doug. Rep. 542. 2d edit.

^c Co. Litt. 244.

^u Cro. Jac. 541.

(7) Where a person of legitimate birth dies intestate without next of kin, and leaves no widow, or a bastard dies intestate without issue and not leaving a widow, the king, as *ultimus hæres*, becoming entitled to what would otherwise have gone to the next of kin, will, in either case, take the whole of the intestate's personal estate, subject to his debts. *Megit v. Johnson*, Dougl. 548. *Rex v. Bank of England*, Ibid. 526. 4 Burn's Eccl. Law, 474.

(8) In *Alsop v. Stacy*, Palm. 9. a child born 40 weeks and ten days after the husband's death was held legitimate, upon

children born during wedlock may in some circumstances be bastards : as in case the husband be out of the kingdom of England (or, as it is commonly phrased, without the four seas) for above nine months, so that access to his wife cannot be presumed, her issue, during that period, will be bastards^v (9). But generally during the coverture access of the husband is presumed, unless the contrary be proved^w.

^v Co. Litt. 244.

^w 3 P. Will. 276. Stra. 925.

the principle that courts are always in favour of legitimacy.

(9) The doctrine that unless the husband was out of the kingdom during the whole time of gestation, access must be presumed, and the child must be deemed legitimate, being upon examination found unsatisfactory, has been long exploded ; and it is now holden that non-access (that is, the non-existence of sexual intercourse) may be proved to bastardize the issue, although it should appear that the husband was within the kingdom during the whole period of gestation. *Pendrell v. Pendrell*, Stra. 905. *Rex v. Bedall*, Ibid. 1076. *Goodright v. Saul*, 4 T. R. 356. The general principle to be deduced from the authorities on this subject, as it was laid down and confirmed by the case of *The King v. Luffe*, 8 East, 193. appears to be this, that where there are circumstances which shew an impossibility that the husband could be the father, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, or from his continued absence, or from the birth of a child very shortly after he had access, the presumption in favour of legitimacy is at an end, and the child will be deemed illegitimate. And this point has been since established by the opinion of the judges in the case of the Banbury claim of peerage, in which it was held, that where the husband and wife are not proved to be impotent, and have had opportunity of access to each other during the period in which a child could be begotten and born in the course of nature, the presumption of legitimacy, arising from the birth of the child during wedlock, may be rebutted by circumstances inducing a contrary presumption, and the fact of non-access, or of non-generating access, as well as the fact of impotency, may always be lawfully proved by

In case of a divorce in the spiritual court *a vinculo matrimonii*, or from the band of matrimony, all the issue born during the coverture are bastards, for such an absolute annulling of the marriage can only take place where some cause is shewn, which made the marriage unlawful from the beginning (10).

Besides what has been mentioned concerning bastards, it should be observed, that it must be consanguinity or relationship by blood, and not affinity, or relationship by marriage, whereby persons may be entitled as kindred to an intestate's estate; for as to such as have married with any of the intestate's family or relations who have died before him, no advantage can accrue to them by such marriage; for example, suppose A was to die intestate, and the only issue he ever had were a son and a daughter, both of whom had married, and died before him, leaving a wife and husband, who survived him; neither this wife nor husband would have any part of A's real or personal estate, but his wife (if such were living,) would have the whole; but if none of them were living, the whole personal estate would go to his next of kindred in such manner as has been shewn, and the real estate to such as are described in the ensuing chapter. And if A had died intestate without wife or child, and his only kindred had been a brother and sister, both of whom had married and died before him, leaving

means of such legal evidence, as is strictly admissible in every other case where a physical fact is to be proved. Selw. N. P. (5th ed.) 731. See also *Head v. Head*, 1 Simons and Stuart, 150.

(10) And after a divorce *a mensa et thoro*, it is the intention of law, that the parties did not cohabit in disobedience to the sentence of the Ecclesiastical Court, and therefore children subsequently born are *prima facie* bastards; yet if actual access, though contrary to such sentence, should be expressly proved, the former presumption is destroyed, and the issue are accounted legitimate; for the relation of husband and wife is not dissolved. See 1 Woodd. Lect. 392. *Parish of St. George v. St. Margaret*, 1 Salk. 123.

a wife and husband, who had survived him; neither this wife nor husband would be entitled to any part of A's estate; but in this case he would die without kindred, and his real estate would escheat to the king, or lord of the manor, or any other person who might be entitled thereto by virtue of any grant from the crown, and his personal estate would vest in the king, as we have lately hinted; and thus it would be in respect to the husband of A's mother, and the husband or wife of any one that were his next of kin, and had married and died before him. But in case his son or daughter, brother, sister, or mother, or any other who were his next of kin, had survived him, and died in ever so short a time after, then the husband or wife of him, or she that had survived him, might be entitled; that is, the husband in right of the wife, and the wife in respect of her husband; but neither of them as being of kin to A. The right of the distributive share vests immediately on the intestate's death. Although by the statute no distribution is to be made within a year; yet the share of the deceased person is an interest vested and transmissible to his executors or administrators.

CHAPTER IV.

OF THE DESCENT OF REAL ESTATES, OR ESTATES OF INHERITANCE. — HOW THE LAW DISPOSES THEREOF TO THE HEIR; THE HUSBAND OF A DECEASED WIFE, AND THE WIFE OF A DECEASED HUSBAND.

SECTION I.

How the Law disposes of the Inheritance to the Heir.

ALL freehold estates are called real estates, and may be of inheritance, or not of inheritance. The principal freehold estates of inheritance are fee-simple and fee-tail. There are

also estates of inheritance, which descend according to the custom of gavelkind, borough-english, and the customs of manors, yet do not all come under the legal description of freehold; with those latter, as well as the former, an administrator, as such, has no concern, except it be with the estate held *pur autre vie*. To avoid confusion, those latter estates will be defined towards the end of this chapter. — Fee-simple is where a man hath lands, tenements, or hereditaments, (the latter of which comprehend not only all kinds of grounds, as arable or ploughed ground, meadows, pastures, woods, moors, marshes, and all kinds of houses, edifices, or buildings, which are called corporeal hereditaments, but also advowsons or rights of presentation to churches, commons, ways, offices, dignities, pensions, annuities, and rents, which are called incorporeal hereditaments); to hold to him and his heirs for ever, generally, absolutely, and simply, without any particular heirs being mentioned, but that being referred to his own pleasure, or the disposition of the law, in case he makes no disposition thereof himself, as he may to whom he thinks fit. And hence we may perceive, that this estate may consist both of corporeal and incorporeal hereditaments, or either. But no person can be properly such an ancestor, as that an inheritance in lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold; or unless he hath had what is equivalent to corporeal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson, and the like^a. And therefore all the cases which will be hereafter mentioned (respecting descent to the heir), are upon the supposition that the deceased was the last person actually seised of the inheritance. For the law requires this notoriety of possession, as evidence that the

^a 2 Black. Com. 209.

ancestor had that property in himself which is to be transmitted to his heir ^b.

Descent or hereditary succession, is a title whereby a man, on the death of his ancestor, acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate so descending to the heir, is in law called the inheritance. The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance, and the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descent is broken and altered, perpetually refer to this settled law of inheritance, as a *datum*, or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. It may be perceived, that this is an estate confined in its descent to such heirs only of the donee as have sprung, or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir: this is a point, that we must resort back to the standing law of descents in fee-simple, to be informed of^c. — Concerning fee-tail, more will be said in the two subsequent sections. — In order to obtain a right conception of the law of descents in fee-simple, which will now be treated on alone, it will be necessary to observe the following rules:—

The first rule is, that inheritances shall lineally descend to the issue of the person last actually seised, *in infinitum*, or for ever; but shall never lineally ascend. When therefore a person dies so seised, the inheritance first goes to his issue: as if there be A, B, and C, grandfather, father and son, and

^b 2 Black. Com. 209.

^c *Ibid.* 201.

B the father purchases land and dies; his son C shall succeed him as heir, and not A the grandfather; to whom the land shall never ascend, but shall rather escheat to the lord ^d.

The second rule is, that the male issue shall be admitted before the female. Thus, sons shall be admitted before daughters. As, if A hath two sons, C and D, and two daughters, E and F, and dies; first C, and (in case of his death without issue) then D, shall be admitted to the succession in preference to both the daughters ^e.

The third rule is, that where there are two or more males in equal degree, the eldest only shall inherit; but the females all together. As, if a man hath two sons, A and B, and two daughters, C and D, and dies; A his eldest son shall alone succeed to his estate, in exclusion of B the second son and both the daughters; but if both the sons die without issue before the father, the daughters, C and D, shall both inherit the estate as co-parceners ^f.

The fourth rule is, that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living. Thus the child, grandchild, or great-grandchild, (either male or female) of the eldest son, succeeds before the younger son, and so *in infinitum* ^g. And these representatives shall take neither more nor less, but just so much as their principals would have done. As, if there be two sisters, A and B, and A dies leaving six daughters, and then J. S., the father of the two sisters dies without other issue, these six daughters shall take among them exactly the same as their mother A would have done, had she been living; that is, a moiety, or one half of the lands of J. S. in coparcenary: so that upon partition made, if the land be divided into twelve parts, B, the surviving sister, shall have six thereof, and her six nieces the daughters of A one apiece ^h.

^d Littleton, sect. 3.

^e Hale, 236, 237. 2 Black. Com.

^f Hale's History of the Common 216.

Law, 235. 2 Black. Com. 213.

^h 2 Black. Com. 217.

^g Hale, 238. 2 Black. Com. 217.

This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. For example, suppose the next heirs of *Titius* be six nieces, three by one sister, two by another, and one by a third; his inheritance by the law of England will be divided into three parts, and distributed *per stirpes*, thus; one-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child, who is the sole representative of her mother¹. This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males^k. The issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the same^l. Among these several issues, or representatives of the respective roots, the same preference to males, and the same right of primogeniture, or first birth, obtain, as would have obtained at first, among the roots themselves, the sons or daughters of the deceased. As, if a man hath two sons, A and B, and A dies, leaving two sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate: and if A had left only two daughters, they should have succeeded also to equal moieties, or halves of the whole, in exclusion of B and his issue. But if a man hath only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and son, who is younger than his sister: here, when the grandfather dies, the eldest son of C shall succeed to one-third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his eldest sister. And the same right

¹ 2 Black. Com. 217.

^k *Ibid.* 218.

^l Hale, H. C. L. 237, 238.

2 Black. Com. 218.

of representation, guided and restrained by the same rules of descent, prevails downward *in infinitum* ^m.

The fifth rule is, that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to the blood of the first purchaser, subject to the three preceding rules. Thus, if G. S. purchases land, and it descends to J. his son, and J. dies seised thereof without issue, whoever succeeds to this inheritance must be of the blood of G. S. the first purchaser of this family ⁿ (11). The first purchaser is he who first acquired the estate to his family, whether the same was transferred to him by sale, or by gift, or by any other method except only that of descent ^o. This is the principle upon which the law of collateral inheritances depends; that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser ^p; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally

^m 2 Black. 218, 219.

^p Hale, H. C. L. 242, 243. 2

ⁿ Hale, 217. 219. 2 Black. 220. Black. Com. 223.

^o 2 Black. 220.

(11) It is not always necessary that he who inherits should be heir to the first purchaser. It is sufficient if he be of his blood, and heir to him who was last seised. For instance, the father purchases lands which descend to the son, who dies without issue: they shall never descend to the heir of the part of the son's mother. But if the son's grandmother has a brother, and the son's great-grandmother has a brother, and there are no other kindred, they shall descend to his grandmother's brother. And yet if the father had died without issue, his grandmother's brother would have been preferred before his mother's brother; because the former was heir of the part of his father, though a female, and the latter was only heir of the part of his mother. But where the son is once seised, and dies without issue, his grandmother's brother is to him heir of the part of his father, and being nearer than his great-grandmother's brother, is preferred in the descent. See 2 Hal. H.C.L. 122.

descended. As if A dies without issue, his estate shall descend to C his brother, who is lineally descended from D, his next immediate ancestor or father. On failure of brethren or sisters, and their issue, it shall descend to the uncle of A, the lineal descendant of his grandfather, and so on *in infinitum*⁹.

Here we must observe, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore the father, or other lineal ancestor, is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, &c. but in right of representation, as the offspring of the father, grandfather, &c. of the deceased. But though the common ancestor be thus the root of inheritance, yet with us it is not necessary to name him in making out the pedigree or descent. For the descent between two brothers is held to be an immediate descent; and therefore title may be made by one brother or his representatives to or through another, without mentioning their common father. If G. hath two sons, J. and F., F. may claim as heir to J., without naming their father G., and so the son of F. may claim as cousin and heir to M. the son of J., without naming the grandfather, *viz.* as son of F., who was the brother of J., who was the father of M. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and therefore, in order to ascertain the collateral heir of J., it is in the first place necessary to recur to his ancestors in the first degree, and if they have left any other issue besides J., that issue will be his heir. On default of such we must ascend one step higher to the ancestors in the second degree, and then to those in the third and fourth, and so upward *in infinitum*, till some ancestor be found, who

⁹ 2 Black. 225.

have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of J. must derive his descent; and in such derivation the same rules must be observed with regard to sex, primogeniture, and representation, that have before been laid down with regard to lineal descent from the person of the last proprietor^r.

Here again we must observe, in respect to collateral inheritances, that the heir need not be the nearest kinsman absolutely, but only *sub modo*; that is, he must be the nearest kinsman of the whole blood; for if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded^s.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. As if the blood of J. S. was composed of those of G. S. his father, and L. B. his mother, therefore his brother F., being descended from both the same parents, hath entirely the same blood with J. S., or he is his brother of the whole blood. But if after the death of G. S. L. B. the mother marries a second husband L. G., and hath issue by him, the blood of this issue, being compounded of the blood of L. B. (it is true) on the one part, but that of L. G. instead of G. S. on the other part, it hath therefore only half the same ingredients with that of J. S.: so that he is only his brother of the half-blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord^t. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue, still B shall not be heir to this estate, because he is only of the half blood to A the person last seised; but,

^r 2 Black. Com. 226.

^t *Ibid.*

^s *Ibid.* 227.

had A died without entry, then B might have inherited ; not as heir to A, his half-brother, but as heir to their common father, who was the person last actually seised ^u.

In collateral inheritances, the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female ^v), unless where the lands have, in fact, descended from a female ^y. Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all ; and the relations of the father's father, before those of the father's mother, and so on ^z. Yet whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by his father's side, as such, can ever be admitted to them ; because he cannot possibly be of the blood of the first purchasor. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So also if they in fact descended to J. S. from his father's mother C. K. ; here not only the blood of L. B. his mother, but also of G. S. his father's father, is perpetually excluded. And, in like manner, if they be known to have descended from F. H. the mother of C. K., the line not only of L. B. and of G. S., but also of L. K. the father of C. is excluded ^a. Whereas when the side from which they descended is forgotten, or never known (as in the case of an estate newly purchased to be holden *ut feudum antiquum*, or as a feud of indefinite antiquity ; as all the estates held in fee-simple throughout the kingdom are held ^b), the right of inheritance runs up all the father's side, with a preference to the male stocks in every instance ; and if it finds no heirs there, it then, and then only, resorts to the mother's side, leaving no place untried, in order to find heirs that may, by possibility, be derived from the original purchasor. The greatest probability of finding such was among those descended from the male ancestors ; but upon

^u Hale, H. C. L. 238. 2 Black. 227.

^x Hale, H. C. L. 241. 2 Black. Com. 234.

^y 2 Black. 234.

^z Hale, 242. 2 Black, 234.

^a 2 Black. 236.

^b *Ibid.* 222.

failure of issue there, they may possibly be found among those derived from the females^c.

From what has been here said, the reader may form an idea of the law of descents in fee-simple; and for a more full and perspicuous view thereof, we shall refer to the learned authors here cited, especially to the commentaries of judge Blackstone; where it need not be said this subject is amply treated on, as it is well known, by the book being in the hands of most of the profession of the law, as well as of many of the nobility and gentry throughout the kingdom; on which account, and for its repute and authenticity, it has hitherto been frequently cited instead of other authors.

As to the heir, he is much favoured by the law; as not being liable to pay any simple contract debts due from the deceased, not even if the estate was purchased with the money for which the simple contract debts are due^d (12). And in case the estate is mortgaged, if the deceased have left enough personal estate to discharge all his debts, the real estate must be redeemed for the benefit of the heir. But where the deceased has not left a sufficiency of personal estate to discharge all his debts, the real estate will be liable to answer those due by bonds and special contracts, whereby he hath bound himself and his heirs; and this estate descending from the deceased ancestor, who hath thus bound himself and heirs, will be real *assets*, or assets by descent, mentioned in a former chapter^e. And where the real estate is given to any person. By the statute of the 3 W. & M. c. 14. it is enacted, that all wills and testaments, limitations, dispositions, or appointments, of or concerning any manors, messuages, lands, tenements, or hereditaments; or of any rent, profit, term, or charge out of the same, whereof any person at the time of his decease shall be seised in fee-simple, in pos-

^c 2 Black. 236.

^d 3 Black. Com. 430.

^e Page 55. — Assets by descent,

when liable to answer debts or legacies, will be treated on in a subsequent part of our work.

session, reversion, or remainder, or hath power to dispose of the same by his last will and testament; shall be deemed and taken to be fraudulent, and absolutely void and of none effect, against such persons, their heirs, successors, executors, administrators and assigns, to whom the deceased shall, by bonds or other specialties, have bound himself and his heirs: and all such creditors may have and maintain actions of debt upon their bonds and specialties, against the heir at law of the obligor and such devisee jointly. Yet it is provided, that, where there shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements, or hereditaments, for the raising or payment of any real or just debts (13), or any portions or sums of money for any child or children of any person, other than the heir at law, *according to any marriage contract or agreement in writing, bona fide made before such marriage*, the same shall be in full force; and the same manors, messuages, lands, tenements, and hereditaments, shall be holden and enjoyed by every such person, his heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise or disposition was made, and by his trustee or trustees, their heirs, executors, administrators, and assigns, for such estate or interest as shall be limited or appointed, devised or disposed, until such debt or portion shall be raised and paid ^f. — And where any heir at law shall be liable to pay the debt of his ancestor, in regard of any lands, tenements, or hereditaments descending to him, and shall sell, alien, or make over the same, before any action brought, or process

^f A devise for payment of debts must provide for it in a practicable manner, otherwise it will be within the meaning of this act; as shewn in

a subsequent part of our work, where further mention is made concerning fraudulent devises.

(13) A direction accompanying a devise of real estate to pay simple contract before specialty creditors has been determined not to be void; since being a disposition for payment of debts, it satisfies the words of this proviso. *Müller v. Horton*, Coop. 45.

sued out against him; it is enacted, that such heir at law shall be answerable for such debt, in an action of debt, to the value of the land so by him sold, aliened, or made over; in which case all creditors shall be preferred, as in actions against executors and administrators, and such execution shall be taken out upon any judgment so obtained against such heir, to the value of the said land, as if the same were his own proper debt; saving that the lands, tenements, and hereditaments, *bona fide* aliened before the action brought, shall not be liable to such execution.

SECTION II.

How the Law disposes of a Wife's real Estate; or the Law concerning a Tenancy by the Curtesy of England.

WHERE a man taketh a wife seised of an estate in fee-simple, or fee-tail, and hath issue by her; although the issue afterward die or live, the husband shall hold the land during his life, as tenant by the curtesy of England^a. To make a tenancy by the curtesy, these four requisites are necessary: marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed: therefore a man shall not be tenant by the curtesy of a remainder or reversion^b. But entry is not always necessary to give seisin in deed; for if the land is in lease for years, curtesy may be without entry or even receipt of rent, the possession of the lessee for years being deemed the possession of husband and wifeⁱ. And of some hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife; as in the case of an advowson, where the church has not become void in the lifetime of the wife;

^a Co. Litt. 29.

ⁱ Co. Litt. 29. note 3. 13th edit.

^b 2 Black. Com. 127.

which a man may hold by curtesy, because it is impossible to have had actual seisin of it, and *impotentia excusat legem*²; or impotency excuseth the law. And though, in strictness of law, there cannot be curtesy of trusts, yet the courts of equity have allowed curtesy both of trusts and other interests, which, though in law mere rights and titles, are deemed estates in equity. However, a wife, in point of benefit, may have a trust of inheritance which may be so declared as to prevent curtesy; as by directing the profits during the wife's life to be paid to her separate use¹ (14). If the wife be an idiot, the husband shall not be tenant by the

² 2 Black. Com. 127.

¹ Co. Litt. 29. note 6. 13th edit.

(14) This position was laid down by Lord *Hardwicke* in *Herle v. Greenbank*, 3 Atk. 715. S. C. 1 Ves. sen. 298. but that case stands unsupported, and is not to be reconciled to his lordship's general doctrine in *Roberts v. Dixwell*, 1 Atk. 606., where he says a devise to the separate use of the wife would not bar the husband, because there was a sort of seisin in the wife. And it seems now to be settled, that where the husband is only partially, but not wholly excluded from the enjoyment of the wife's property, his right as tenant by the curtesy is not affected. Thus where by a settlement made previous to marriage, the estate of the wife was conveyed to trustees upon trust for the sole and separate use of the wife during the coverture, with power to her to appoint the fee by deed or will, and for want of appointment in trust for the wife, her heirs and assigns, the Vice-Chancellor held, that although a court of equity would, according to the intention of the settlement, have restrained the husband from all interference with the rents and profits during the life of the wife, yet there being no further exclusion expressed in the settlement, that court could not restrain him from the enjoyment of his general right as tenant by the curtesy in her equitable inheritance. *Morgan v. Morgan*, 5 Madd. 408. But where the husband is wholly excluded, as if the direction be, that upon the death of the wife the inheritance shall descend to her heir, and that the husband shall not be entitled to be tenant by the curtesy, such a provision will be valid, and will destroy the marital claim. *Bennett v. Davis*, 2 P. Wms. 316.

curtesy of her lands; for the king, by prerogative, is intitled to them, the instant she herself has any title^m. — 3. The issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistakeⁿ; crying indeed is the strongest evidence of its being born alive, but it is not the only evidence^o (15). The issue must also be born during the life of the mother: for, if the mother dies in labour, and the Cæsarean operation is performed, the husband, in this case, shall not be tenant by the curtesy: because, at the instant of the mother's death, he was clearly not intitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb: and the estate, being once so vested, shall not afterwards be taken from him^p. The issue that must be so born alive must also be capable of inheriting the mother's estate^q. Wherefore, if a woman be tenant in tail male, and hath only a daughter born, the husband is not thereby intitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail male, and if a woman be delivered of a monster which hath not human shape, he is not capable of inheriting; yet if he hath human shape, though deformed in body, he is capable^r. The time when the issue was born is immaterial, provided it is born during the coverture; for whether it be born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy^s. — 4. By the death of the wife after issue had (as before observed) the husband becomes tenant by the curtesy, and not before^t. Yet by the birth of a child he becomes tenant by the curtesy *initiate*, and may

^m 2 Black. Com. 127.

ⁿ *Ibid.*

^o 8 Co. Rep. 34.

^p Co. Lit. 29.

^q 2 Black. Com. 128.

^r Co. Lit. 29.

^s *Ibid.*

^t Co. Litt. 30.

(15) See Co. Lit. 29. b. where it is said, that to enable a husband to be tenant by the curtesy, it is sufficient if the issue be born alive, though it be not heard to cry, for *peradventure it may be born dumb*.

do many acts to charge the lands, but his estate is not *consummate* till the death of the wife^u.

By becoming tenant by the curtesy, the husband is intitled to hold the estate during his life, and immediately after his death the same must inevitably go to the heir, whether he be a child or distant relation of the wife: and this the husband, as being only tenant by the curtesy, can in no wise prevent; for he cannot alien this estate for any longer term than his own life: wherefore, and for that it may so happen, the husband, on the death of the wife, may have no further benefit from the estate, of which during his wife's life he hath been intitled to the rents and profits. A tenancy by the curtesy seldom happens, except where the wife is seised in fee-simple at any time during her coverture; for she cannot devise this estate by will, as being restrained by the statute of 34 & 35 Hen. VIII. c. 5., neither will the law permit her to convey it to her husband or any other person whatever. For all deeds executed and acts done by her during her coverture are void; except it be a fine, or like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary^x. Yet by a fine, in which she and her husband must join, the estate may be conveyed and assured to any person or persons, for such uses and purposes as the husband and wife shall think fit. So likewise may such estate whereof the wife is seised in fee-tail general, if there is no remainder or reversion expectant thereon, for barring of which a recovery must be suffered, as shewn in the appendix to this work.

SECTION III.

How the Law disposes of a Husband's real Estate; or the Law concerning a Tenancy in Dower.

THE wife is intitled by law to be endowed of one-third part of all such lands and tenements, of which her husband was seised in fee-simple or fee-tail, at any time during the coverture or marriage; to hold the same during the term

^u 2 Black. Com. 128.

^x *Ibid.* 444.

of her natural life^y. But that she might be intitled thereto, she must be the wife of the party at the time of his decease; for if she be divorced *a vinculo matrimonii*, that is, from the band of matrimony, she shall not be endowed; for *ubi nullum matrimonium ibi nulla dos*, that is, where there is no marriage there is no dower. But a divorce *a mensa et thoro*, or from bed and board only, doth not destroy the dower; not even if it is for adultery itself, by the common law^z. But by the statute 13 Edw. I. c. 34., if a woman elopes from her husband and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her (16). And the widows of traitors, or persons attainted of treason, are barred of their dower (except in the case of certain modern treasons relating to the coin^a); but not the widows of felons^b. An alien (one born out of the king's allegiance) cannot be endowed, unless she be queen consort; for no alien is capable of holding lands. And that the wife may be endowed, she must be above nine years old at her husband's death, otherwise she shall not be endowed^c.

^y Co. Litt. 31. The husband being legally seised in fee-simple or fee-tail, during the coverture, entitles the wife to dower; but if he before marriage puts the legal estate out of him, or after marriage purchases an estate and takes a conveyance in his own name and trustee's, the wife will be excluded. And the wife cannot be entitled to dower out of an estate which at the time of her

marriage was subject to a mortgage in fee. Co. Litt. 208. note 1. 13th edit. Nor against a purchaser of the inheritance, who has got an assignment of a term created previous to her right of dower. Amb. Rep. 6.

^z Co. Litt. 92.

^a Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.

^b 2 Black. 131.

^c Co. Lit. 31.

(16) In this respect a distinction subsists between a right to dower, and a claim of jointure; for although adultery is made a forfeiture of dower by the statute, yet that act does not extend to jointures; and the elopement or adultery of a wife will not defeat her of a jointure provided for her under marriage articles. *Buchanan v. Buchanan*, 1 Ball & Beat. 204. *Seagrave v. Seagrave*, 13 Ves. 433. Nor will such misconduct on the part of the wife preclude her from calling for a specific performance of marriage articles entered into in her favour. *Buchanan v. Buchanan*. *Supra*.

The wife being entitled by law to be endowed of one-third part of all such lands and tenements of which her husband was seised in fee-simple or fee-tail, at any time during the coverture or marriage, shall hold such one-third part during the term of her natural life; and that whether she hath issue by her husband or not^d, provided any issue which she might have had might by possibility have been heir. Therefore if a man seised in fee-simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife: though Jane may be endowed of those lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that she could have could by any possibility inherit them^e. A seisin in law (that is, a right to possess) of the husband, will be as effectual as a seisin in deed, which is an actual possession^f, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin^g. Yet the seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again (as where by a fine land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower^h; for the land was merely *in transitu*, and never rested in the husband. But if the land abides in him for a single moment, it seems that the wife shall be endowed thereof (17). This doctrine was extended very far by a jury in Wales, where the father and son

^d Co. Litt. 31.^g Co. Litt. 31.^e 2 Black. Com. 131.^h *Ibid.*^f *Ibid.* 127.

(17) In a late case, in which it appeared that a husband, before Lord *Eldon's* act, borrowed an estate for the purpose of suffering a recovery, in order to acquire the ownership of

were both hanged in one cart, but the son was supposed to have survived the father, by appearing to struggle longest; whereby he became seised of an estate by survivorship, in consequence of which seisin his widow had a verdict for her dower^l. A widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before-mentioned, unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle built for defence of the realm, because it ought not to be divided. But of a castle that is only for the private use and habitation of the owner, a woman shall be endowed^k. So a woman shall not be endowed of a common without stint; for as the heir would then have one portion of this common, and the widow the other, and both without stint, the common would be doubly stocked. But a woman shall be endowed of a common certain; and so of other incorporeal hereditaments; as rent, rent-service, rent-charge, and rent-seck^l, mentioned in this and a former chapter. — Though curtesy out of a trust is allowed, as was mentioned in the former part of the foregoing section, yet dower has been refused thereout; a partiality not easy to be reconciled with reason, however settled by the current of authorities^m. — Where dower is allowable, it matters not though the husband alien or sell the lands during the coverture; for he aliens them liable to dowerⁿ, of which the wife cannot be barred but by a fine, or like matter of record, to which she must be privy, and privately examined; wherefore, and for saving the expence of a fine, it is common, where the estate is but of small value,

^l 2 Black. Com. 132.

^k Co. Litt. 31.

^l *Ibid.* 32.

^m Co. Litt. 29. note 6. 19th edit.

ⁿ *Ibid.* 32.

money to be laid out in land, the Vice-Chancellor inclined to think that the wife was dowable of the estate borrowed. *Henley v. Webb*, 5 Madd. 407.

for the husband, when he conveys it, to bind himself by a bond, to save harmless and keep indemnified the purchaser, against any claim that might afterwards be made for or in respect of dower. Yet as there is no method of effectually barring the wife but by a fine, or like matter of record, the bond can be of but little use if the obligor should die insolvent; so that it behoves the purchaser, in case he takes a bond, instead of having a fine passed, to look well to the probability of the obligor's dying solvent, and leaving a sufficiency to discharge the bond, in case dower should be demanded.

But it now seldom happens that the wife has any claim to dower; for not only upon most preconcerted marriages, a settlement is made pursuant to the statute of 27 Hen. VIII. c. 10., and thereby she is barred by a jointure made to her in lieu thereof, but when a man purchases an estate in fee-simple, it is usual for him, in order to prevent his wife having any claim of dower therefrom, and to save the expence of a fine, in case he should sell it, to take the conveyance in his own name and the name of another person as trustee; as for example, suppose A. B. to be the grantor, C. D. the grantee who purchases this estate, and E. F. a friend of C. D. the grantee. Now, in consideration of the sum agreed for by C. D. to be given to A. B. for this estate, and in consideration of 5s. a piece paid by the said C. D. and E. F., the said A. B. sells and aliens this estate to C. D. and E. F. TO HOLD, unto the said C. D. and E. F. and their heirs, to the use of the said C. D. and E. F. and the heirs of the said E. F. In trust, nevertheless, as to the estate and interest of the said E. F. and his heirs, to the only proper use and behoof of the said C. D. his heirs and assigns for ever, and to and for no other use, trust, intent or purpose whatsoever. So by this means the wife of C. D. will have no claim or title to dower from the estate; and C. D. may sell and safely convey the same to a purchaser without passing a fine to bar his wife of dower. So if a husband before marriage conveys his estate to trustees and their heirs,

whereby he puts the legal estate out of him, the wife after his death shall not be endowed (18).

Here we may observe what has been mentioned concerning the descent of estates held in fee-simple, and how the law disposes thereof, and of those held in fee-tail, that this is consistent with the general law of the land. But particular counties, cities, towns, manors, and lordships, being indulged with the privilege of abiding by their own customs, which privilege is confirmed to them by several acts of parliament, those customs prevail in contradistinction to the rest of the nation at large^o. Of those customs is the custom of gavelkind, chiefly subsisting in Kent, though it is to be found in other parts of the kingdom^p. By this custom, not only the eldest son of the father shall succeed to his inheritance, but all the sons alike^q. And though the ancestor may be attained and hanged, yet the heir shall succeed to his estate without any escheat to the lord^r. And by this custom the husband shall be tenant by the curtesy without having any issue^s; yet curtesy by the custom of gavelkind, is subject

^o 1 Black. Com. 75.

^p *Ibid.* 74.

^q Co. Litt. 175.

^r 1 Black. Com. 74. 2 *Ibid.* 84.

^s Co. Litt. 30.

(18) And where there is a conveyance of lands to a trustee to such uses as A shall appoint, and in the meantime, and until he makes an appointment to the use of A and his heirs, A has a qualified and determinable fee, until by the exercise of the power an use vests in the person in whose favor the appointment is made; and by such appointment the right to dower, which belonged to the wife of A, is extinguished and gone. For, from the time of the appointment, the use appointed under the power will take effect in the same manner as if it had been inserted in the original deed creating the power, and as if it had stood in the place of that power. *Ray v. Pung*, 5 Barn. & Ald. 561. S. C. 5 Madd. 310. *Moreton v. Lees*, Sugd. on Pow. 339. See also *Watk. Pr. Conv.* (ed. Preston) 48. But if no appointment is made, the fee from being qualified and determinable becomes simple and absolute, and consequently the right to dower attaches. See *Maundrell v. Maundrell*, 10 Ves. 255.

to several disadvantages ; for it is only a moiety of the wife's land, and it ceaseth if the husband marries again ^t. — By the statute 31 Hen. VIII. c. 3. a great part of Kent is made descendable to the eldest son, according to the course of the common law ; as by means of that custom divers ancient and great families, after a few descents, came to very little or nothing ^u. And there are six other statutes for disavelling particular lands in Kent, besides the 31 Hen. VIII., though that is the only statute in print. Those are mentioned in Mr. Robinson's book on gavelkind ^x. — Another of those customs is the custom that prevails in divers ancient boroughs, and therefore called borough-english, whereby the youngest son shall inherit the estate in preference to his elder brothers ^y. And there is a custom in other boroughs, that a widow shall be entitled for her dower to all her husband's lands ; whereas by the common law she shall be endowed of one-third part only ^z. Likewise there are special and particular customs of manors, of which every one has more or less, and which bind all the copyhold and customary tenants, that hold of the said manors ^a. Some copyholds are for lives, one, two, or three successively ; and some, inheritances from heir to heir by custom ; and custom ruleth those estates wholly, both for widow's estates, fines, heriots, forfeitures, and all other things ^b. — The customs that prevail in the city of London and province of York, which comprehend so considerable a part of the kingdom, will be the subject of the ensuing chapter.

^t Co. Lit. 30. note 1. 13th edit. refers to Robins, Gavelk. b. ii. c. 1. and says, " There the learned author suggests, that some have doubted whether there is any such variance between the common law and the custom, and therefore undertakes to prove it by authorities on record."

^u Co. Litt. 140.

^x Robins, on Gavelk. 75.

^y 1 Black. Com. 75.

^z *Ibid.*

^a *Ibid.*

^b Bacon's Law Tracts, 137.

CHAPTER V.

OF THE CUSTOMS OF THE CITY OF LONDON AND PROVINCE OF YORK.

SECTION I.

Wherein the Customs of London and York agree, and wherein they vary.

WHAT those customs are within the city of London and province of York, which comprehend so large and considerable a part of the kingdom, it is somewhat strange, says Dr. Burn, that so few authors have taken any pains to inform their readers or themselves; and that those customs are so ancient, and of ancient times were of such general and almost universal extent, that some of the greatest lawyers have doubted whether they were not part of the common law^a. Formerly, not only in the province of York and city of London, but in most, if not in all parts of England, a man was restrained from bequeathing the whole of his personal estate away from his wife and children; but the law in that particular is now altered, though it continued in the province of York, the principality of Wales, and in the city of London, later than in other parts of the kingdom, and till very modern times; when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes were provided, the one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5.^b for the province of

^a 4 Eccles. Law, 368.

^b This statute of 2 & 3 Ann. recites, that a proviso was contained in the statute 4 W. & M. that nothing therein contained should extend to the citizens of the city of York; and that the mayor and commonalty, on behalf of the inhabitants of the said city, had requested that the said proviso might be repealed. And by the statute 2 & 3 Ann. it is enacted that the said proviso, as far as the same concerns the citizens of

the city of York, shall be repealed; so that it shall be lawful for all and every the citizens of the city of York, who shall be freemen of said city, inhabiting therein, or within the suburbs thereof, by their last wills and testaments, to dispose of their goods, chattels, and other personal estate, to such persons as they shall think fit, as any other persons inhabiting within the province of York may lawfully do by virtue of the statute 4 W. & M.

York; another 7 & 8 W. III. c. 38. for Wales; and a third 11 Geo. I. 2. 18. for London: whereby it is enacted that persons within those districts and liable to those customs, may (if they think proper) dispose of all their personal estates by will; and the claims of the widow's children and other relations to the contrary are totally barred. So that now, throughout all the kingdom of England, a man may devise the whole of his chattels as freely as he formerly could any part thereof^c. But in case of intestacy, the statute of distribution expressly excepts and reserves the customs of the city of London and province of York. So that although the restraint of devising is removed by the statutes just mentioned, yet the ancient customs of London and York remain in full force with respect to the estates of the intestates^d. And by the custom of the city of London, there is still a difference to what it is in most other parts of the kingdom in respect to the disposing the care of children^e, as by the statute 12 Car. II. c. 24. any father under age, or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of twenty-one years. But if the father is a freeman of London, he cannot devise the disposition of

^c 2 Black. Com. 493. By the statute 11 Geo. I. it shall be lawful for all persons who, after the 1st of June 1725, shall become free of the city of London, and for all who at that time shall be unmarried, and not have issue by any former marriage, to dispose of their personal estate. But if any person who shall be free of the city hath agreed or shall agree by writing, in consideration of marriage or otherwise, that his personal estate shall be distributed according to the custom of the city; or in case any person so free shall die intestate, his personal estate shall be subject to the custom. A freeman of London, who had a son by a former marriage, married a

second wife. The son afterwards died, and the husband devised his personal estate to be laid out in securities, and the interest of the whole to be paid to his wife for her life, and after her decease the principal to be paid to his sister and her children, or such of them as should be then living. The widow claimed a moiety of the personal estate by the custom of London; and held by Lord Hardwicke, chancellor, with great clearness, that she is entitled to it. The custom of London not being taken away by stat. of 11 Geo. I. in this case. *Danson v. Hawes*, Amb. Rep. 276.

^d 2 Black. Com. 518.

^e Co. Litt. 66.

the body of his child; and if he doth, yet the infant shall remain in the custody of the mayor and alderman^f, who are guardians to the children of all freemen of London that are under the age of twenty-one at the time of their father's decease^g. So that if a freeman or free-woman die, leaving orphans within age unmarried, the court of orphans, which is held by custom time out of memory, before the lord mayor and aldermen of the city of London, shall have the custody of their body and goods; and the executors or administrators shall exhibit inventories before them, and become bound to the chamberlain to the use of the orphans, to make a true account upon oath; and if they refuse, they may be committed till they become bound^h. And their being bound in the spiritual court doth not excuse them from this customⁱ, as they may still be compelled to give other security to the chamber of London^k. And if any person intermarry with an orphan without the consent of the court, such person may be fined by them, according to the quality and portion of the orphan; and unless such person pay the fine, or give security to pay it, they may commit him to Newgate, to remain there till he submit to their orders^l. A peer has no privilege for taking and marrying an orphan of London without licence^m. — He that marries an orphan without the consent of the court, must make a jointure before he receives the portionⁿ. — Upon the marriage of orphans; the custom is to appoint the common serjeant to treat and take security for the orphan^o.

As to intestacy, in the main the customs of London and York agree; but there are some variations, and in two principal points they considerably differ. The one is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament^p; and if they die

^f Priv. Lond. 287.

^g *Ibid.* 288.

^h *Ibid.* 280. 287.

ⁱ Law of Exec. 252.

^k 1 Roll's Abr. 550.

^l Priv. London, 282, 283.

^m Lev. 163.

ⁿ Priv. Lond. 286.

^o Laws of Lond. 67.

^p 2 Vern. 558.

under that age, whether sole or married, their share shall survive to the other children^q. The other is, that in the province of York, the heir at common law, who inherits any land, either in fee-simple or fee-tail, is excluded from any filial portion or reasonable part^r. — As those variations will appear more conspicuous hereafter, we shall now proceed to take a view of those customs under two distinct heads.

SECTION II.

The Customs of the City of London as to Intestacy.

IF a freeman of London dies in London or elsewhere, *intestate*, though his estate doth not lie in the city, but elsewhere, his children are entitled to their share of his personal estate by the custom^s. And if the freeman dies, leaving a widow and a child or children, his personal estate (after his debts are paid, and the customary allowance for his funeral, and for the widow's chamber^t, are deducted thereout) is, by the custom of the city, to be divided into three equal parts, and disposed of in the following manner: to wit, one-third part thereof to the widow, another third part to the children, and the other third part (being taken out of the custom) is now, by the statute 1 Jac. II. c. 17. made subject to the statute of distribution; and so dividing the whole into nine parts, four-ninths belong to the wife, and five-ninths to the children^u. And if a man dies worth 1800*l*. leaving a widow and two children, the estate shall be divided into eighteen parts, whereof the widow shall have

^q Prec. Cha. 537.

^r Swinb. 231.

^s Priv. Lond. 288.

^t The widow's apparel, and furniture of her bedchamber, in London, is called the widow's chamber. 2 Black. Com. 518. In a case before Lord Parker, it was said that

the widow is entitled to the furniture of her chamber; or, in case the estate exceeds two thousand pounds, then to fifty pounds instead thereof. — *Bridle v. Bridle*, 7 Vin. Abr. 200.

^u 2 Salk. 426. L. Raym. 1328. 1 Vern. 180.

eight, six by the custom, and two by the statute, and each of the children five, three by the custom and two by the statute: if he leaves a widow and one child, she shall still have eight parts as before, and the child shall have ten, six by the custom and four by the statute^w. And if there should be an after-born child, such child will come in with the rest for the customary share of the father's personal estate^x. If the freeman leaves a widow, and no child, the widow shall have three-fourths of the whole; two by the custom, and one by the statute, and the remaining fourth shall go by the statute to the next of kin^y. If he hath no wife, but hath children, the half of his personal estate belongs to his children, and the other half (being, as it is called, the dead man's part; because formerly the ordinary, or he to whom the ordinary committed administration, was to dispose of the same to pious uses for the benefit of the deceased's soul) is now distributable amongst the children by the statute^z. And if he hath neither wife nor child at the time of his death, then the whole belongs to the deceased, and is distributable by the statute^a. As to the freeman's grandchildren, the custom doth not extend to these, as hath been determined in several cases^b.

We may now observe what situation the widow must be in at the time of her husband's death, that she may be entitled to his personal estate; as whether there is any settlement whereby she may be barred of her customary part, or the part she may be entitled to under the statute of distributions; and also the situation the children must be in that they may be entitled; as whether any of them have been advanced, so as thereby to be barred in part or in whole of what they would otherwise be entitled to: which, after being considered, more will be said concerning the distribution.

^w 2 Black. Com. 518.

^x Prec. Cha. 499.

^y 2 Black. Com. 519.

^z 1 P. Will. 341.

^a Law of Test. 196.

^b 1 Vern. 367. 1 P. Will. 341.
2 Salk. 426.

If the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of non-entity with regard to the custom only; but she shall be entitled to her share of the dead man's part under the statute of distributions, unless barred by special agreement^e; and if a freeman of London makes a jointure on his intended wife, and the same is expressed to be in bar only of her dower, or thirds of lands, tenements, and hereditaments, this shall not bar her of her customary share of his personal estate^d (1): yet it is otherwise, if it is said to be in bar of her customary part^e. In respect to the part she will be entitled to under the statute of distributions; where a freeman, whose wife has been compounded with, dies intestate, his widow shall have such part as she is entitled to under the statute of distributions, if there are no express words in the agreement to exclude her^f: but where a widower and widow being about to intermarry, and having only personal estate; by articles made before marriage, agreed, that in case the husband survived, he should have two thousand pounds only of his wife's personal estate, and the rest to be at her disposal, &c. and in case the wife survived, then she was to have two thousand pounds out of the husband's personal estate, without saying *only or no more*. The husband, being a freeman of London, died; and his wife brought her bill for an account of his personal estate over and above the two thousand pounds, and so to be let into the customary share thereof: but it was decreed, that the equitable construction of those articles must be to exclude the wife from any further share out of the estate; and, though the words

^e 2 Black. Com. 519.

^d Eq. Cas. Abr. 158, 159.

^c 1 P. Will. 530. If there be a proviso in a settlement that the wife

should not be barred, she will be entitled to her shares by the statute and custom.

^f Prec. Cha. 327.

(1) Such also is the case if the intestate covenant to lay out money in a purchase of land by way of jointure, for the money has in equity all the qualities of land. 1 P. Wms. 532.

were not so full to exclude her, yet the intent of the articles appearing to be a mutual reciprocal agreement between them for settling each other's claim, ought not to be extended larger on one side than the other, and decreed that the wife must have only the two thousand pounds^s.—Where a freeman of London, who was a widower, and had several children, being possessed of a considerable leasehold estate, on a second marriage conveys these leases in consideration of 2000*l*. portion in trust for himself for life, remainder to his wife for life, *in lieu and bar of all dower, customary estate, &c.* remainder to the first son of that marriage, and so to every other son; and in the settlement there was an agreement that the trustees should sell those leases, and invest the money in the purchase of lands of inheritance to be settled to the uses aforesaid; but the husband died before any purchase made, and it was held that the wife was barred from claiming any other part of the personal estate^h. And where a settlement was made on the wife of a citizen, of part of the personal estate of the husband, in bar and satisfaction of all her claim and demand out of his personal estate, *by the custom or otherwise*, and the husband died intestate; it was decreed that the wife was barred of her distributive share of his estate by the statute of distributionsⁱ.

Hence we may perceive, that if there are sufficient words in a settlement made previous to marriage, the free-man's wife will be barred of the claim she might otherwise have to her husband's personal estate, either by the custom or by the statute of distributions; in consequence of which it will be as if there was no wife, and the children will have one half by the custom, and the other half by the statute^k. And if the wife be divorced for adultery, she shall not have her customary share^l.

If any of the children are advanced by the father in his

^s Laws of Lond. 102.

^h Eq. Cas. Abr. 153.

ⁱ *Badcock and Stanhope*, 7 Vin. Abr. 211.

^k P. Will. 644. 2 P. Will. 527.

^l Bunb. 16.

lifetime, with any sum of money (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom: but if they are fully advanced, the custom entitles them to no further dividend^m. — The advancement must be of money or personal estate; for the custom extends only to the personal estate of a freeman; because, when it first began, the citizens of London had no regard at all to a real estate, as they did not suppose any freeman of London would purchase such an estate, but would employ his whole fortune and stock in trade for the benefit of commerceⁿ. So a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot^o: and if a citizen conveys to a child land of inheritance, though it be expressed for advancement, it bars no child's part; but such may come in for a share of the personal estate with the rest^p. And it has been certified, that where an heir or co-heir had a real estate settled on him or her, the same was out of the custom of the city of London; and though the father should afterwards declare it to be a full advancement for such child, yet that was no bar to his orphanage part; neither was it to be brought into hotchpot, but was clearly out of the custom^q. And where money was given by the father to be laid out in land to be settled on the son and the intended wife for their lives, with remainders in tail; and the question was, whether this should be reckoned to be an advancement by part of the personal estate of the father, so as the son ought to bring the same into hotchpot, to entitle him to a share of the personal estate? it was held by the lord chancellor, that this money was not to be reckoned as part of the personal estate^r.

How this advancement is to be bestowed, and what shall be deemed an advancement either in part, so that the child

^m 2 Black. Com. 519.

ⁿ Abr. Eq. Cas. 150.

^o 1 Cha. Cas. 160.

^p *Ibid*.

^q 1 Vern. 216.

^r *Annand and Honeywood*, 1 Vern. 345.

must bring the same into hotchpot before he be entitled to any benefit under the custom; or in the whole, so as thereby the child will be excluded from having any further portion, seems to have been much questioned. Though it is said, generally, by a late author, that any provision made by the father in his lifetime for his children, is advancement within the custom; but that a settlement of a real estate on a child is no advancement, nor to be brought into hotchpot^a. Yet small inconsiderable sums occasionally given to a child cannot be deemed an advancement, or part thereof; neither is maintenance money, or an allowance made by a freeman to his son at the university, or in travelling, &c. to be taken as any part of his advancement; this being only his education, and it would create charge and uncertainty to enquire minutely into such matters. So putting out a child apprentice is no part of his advancement, for it is only procuring the master to keep him for seven years instead of the parent^b (2).

It is questioned by Mr. Vernon, whether only the provision made on the marriage of a child, or in pursuance of a marriage agreement, is an advancement^c; and where 400*l.* were given to a daughter long after her marriage, and without any agreement that the same should be for her marriage-

^a Law of Test. 205.

^b Laws of Lond. 82.

^c 1 Vern. 89.

(2) A legacy left to a child by the father dying partially intestate is not an advancement within the custom, 2 Atk. 277.; neither is property given to him by any other person than his father. A provision, to constitute an advancement under the custom, must be one made for the child by the father, while living, out of his personal property. Laws of London, 82. 1 Vern. 61. 1 Ves. 17. 3 Atk. 213. 452. 3 P. Wms. 317. note (o). 1 Wils. 168. In short, there must in all instances of this nature be a valuable consideration moving from the father, and an actual benefit accruing to the child. Law of Test. 204. 1 Vern. 61. 89. 216. 1 Atk. 403. 3 Atk. 528.

portion; the lord chancellor was of opinion, that it could not be any advancement, unless it had been given her as a marriage-portion, or in pursuance of a marriage-agreement ^w. — Upon a reference to the recorder of London, by the lord chancellor, to certify what is the custom of London concerning the advancement of children by their father; it was certified, that by the laws and customs of the city, if any freeman's child be married in the lifetime of his or her father, by his consent, and not fully advanced to his full part or portion of his father's personal or customary estate, as he shall be worth at the time of his decease; such freeman's child, so married, shall be excluded and debarred from having any farther part or portion of his or her father's personal or customary estate, to be had at the time of his decease; except such father, by some writing by him written and signed with his name or mark, shall declare and express the value of such advancement; and then every such child, after the decease of his father, producing such writing, and bringing such portion so had of his father, into hotchpot, shall have as much as will make up the same a full child's part or portion of the customary estate which his father had at the time of his decease; notwithstanding such father shall by any writing under his hand and seal declare such child was by him fully advanced ^x. — It is said to be sufficient, if the freeman declare the advancement by any writing under his hand, or by any thing written by him, although it be in an almanack, or elsewhere ^y. But in the case of *Dean and Lord Delaware*, the father's declaring, that the child was fully advanced or not advanced, was of no avail, unless it appeared what the advancement was in certainty; to the intent that it might be known, whether such advancement did amount unto as much as would have belonged to the child by the custom ^z. And in a case where a freeman had advanced his child on marriage, and the certainty of that advance-

^w 1 Vern. 61.

^y Green's Privil. Lond. 53.

^x *Chase v. Box*, 1699. L. Raym. 484. Eq. Cas. Abr. 154.

^z 2 Vern. 630.

ment did not appear under the freeman's hand ; it was adjudged a full advancement, and that the freeman's declaration alone that he had advanced his child, was not of itself sufficient ^a.

The child of a freeman of London, when of age, may, in consideration of a present fortune, bar herself of her customary part ; as where the father, on his daughter's marriage, agreed to give her 3000*l.* ; which she, being of age, covenanted to receive in full of her customary share as a freeman's daughter : and though it was objected, that such a future right cannot be released, and that parents might make an ill use of the power they have over their children in forcing them to give such discharges ; yet this was held a good bar of the custom, there being no fraud in the transaction ^b. But such release, without a valuable consideration, is not good ; for in such case, at the time of the release, the children having neither *jus in re* nor *jus ad rem*, that is, neither right in the thing nor right to the thing, the whole being in the father during his life, there is nothing for any release to operate upon ^c.—If a man who is of age marries a freeman's daughter who is under age, he may bar himself of any future right that he might have to the freeman's customary estate by virtue of such marriage ; as where a freeman of London had two daughters and one son ; one of the daughters married, and on receiving a suitable portion, the husband released all right and interest which he had or might have to any part of the father's personal estate by the custom or otherwise ; and covenanted, that at any time after the death of his father, he would do any further act for the releasing of any right which he might have by the custom. Jekyll and Gilbert, commissioners, inclined to think, that the release being for a valuable consideration, purporting to be an agreement to quit the right to the orphanage part, was binding in equity ; but though this might not be so clear, yet the covenant for a valuable consider-

^a *Cleaver and Spurling*. 2 P. Will. 527. — See more concerning advancement, post.

^b 2 Eq. Cas. Abr. 272. Str. 947.

^c 1 Ark. 402.

ation to release the future right is good ; and so they decreed on the execution of the release^d. Where the husband and wife, in consideration of 2000*l.* the wife's marriage portion, covenanted to release all the right and interest that might accrue to them out of the father's personal estate by the custom of the city of London, and a bill was brought to have a specific performance of the articles made on the marriage : the defence made for the defendant was, that the customary part being a mere possibility and contingency, which might or might not happen, it could not be released ; and if it could, that at the time of the articles, the wife was an infant, and so not bound by them ; besides, that the 2000*l.* was no consideration for releasing such an interest, the wife's father having died worth upwards of 20,000*l.* By Lord Chancellor Hardwicke : These considerations are too loose either for a judge at law, or in this court, to lay any weight upon ; and I must determine according to the facts, by the rules of law, and of this court. In this case there appears to have been a valuable consideration for the agreement in the articles, because at the time when the 2000*l.* was given, the defendant's wife was entitled to no part of the estate of her father ; and it was given for her advancement in the world ; and it is highly reasonable that such kind of articles should be carried into execution, and that when a father is bountiful to his children in his lifetime, he should have his affairs settled to his own satisfaction. As to the objection of the customary part being a possibility, and merely in contingency, it is of no weight ; for there is no doubt it might be released in equity : but here is a covenant, which the defendant is bound by in all events. And it is no objection to say, that the wife was under age ; for though in this respect, if the husband were dead, the articles would not bind her, and she would by survivorship be entitled to the customary share, as a chose in action not recovered or received by the husband ;

^d 2 P. Will. 272.

yet he being alive, it is a matter that accrues to him in right of his wife; and he may release it, and his release will bind her; and therefore it was reasonable he should perform his covenant. I found my opinion too on an old law well known in the city, by the name of Jud's law; whereby a husband was authorised to agree with the father for the wife, though she was under age^e.

As to children partly advanced, bringing their advancement into hotchpot; it may be observed, as has been mentioned, that it is to be brought in among the brothers and sisters only, but not with the widow: for it has been determined to be beyond all doubt, that where a child that had a portion, but was not fully advanced, but was to bring her portion into hotchpot, that the portion should not be brought into the personal estate in general, so that the widow might come in for part of it; but that it should be brought into the orphanage part only^f. And where a freeman of London hath but one child, and he hath received some portion from his father, and the father dies leaving this child and a wife; the child shall have his full orphanage part, without any regard to what he hath already received^g. And where an only child is in part advanced by the father in his lifetime, such child shall not bring his portion into hotchpot, there being none in equal degree with him^h; the only meaning of bringing the child's share into hotchpot is, to make an equality among the children, and not for the benefit of the motherⁱ.

^e *Medcalfe and Ives*. 1 Atk. 63.

^f 1 Vern. 345.

^g 2 Salk. 426.

^h 2 Vern. 234.

ⁱ 2 P. Will. 526. — A freeman of London dies, leaving a widow and one only child, a daughter. On bill by the daughter against the mother and executrix, the question was, Whether she had been advanced by the father, and so excluded from the customary share; it appearing by her answer, to the cross bill, that her father had given her several

sums of money, in all about 100 moidores; and the custom of London was insisted on, and if it appears the father has advanced his child money, and the exact sum does not appear under his hand, it shall be taken as a full advancement. — Lord Chancellor doubted of the fact of any advancement; for he said, every present which a father makes his child shall not be considered as an advancement: but supposing she was advanced, yet the custom only holds amongst children, not between

If a freeman having several children, or but one child, doth *fully advance* all his children, or his single child, this satisfies the custom, and is the same as if he had no child, and his personal estate shall go as if there was none^m, and the wife shall have a moiety^a, or one half; which must be understood to be a moiety or one half by the custom, from which the children, or one child, being full advanced, are excluded. So consequently, it seems, that the other moiety or one half must fall under the direction of the statute of distributions, and be distributed as the statute directs (3).

The custom, it may be observed, extends only to the wife and children; whereas, if there is neither wife nor child living at the intestate's death, the whole of his personal estate is subject to the statute of distribution, as has been mentioned, and consequently must be distributed in the same manner as was shewn in a former chapter.

Besides what has been mentioned, concerning how distribution is to be made where the freeman leaves a wife, child, or children; and as we have now seen that the wife may be barred by settlement, and the children by being advanced; we may here observe, that the course of distribution of the personal estate of a freeman of London seems to be thus:

If the freeman dies intestate, leaving no wife, but an only

an only child and the widow. And so held in the case of *Lord Delaware*; and so is the purport of the certificate in *Chase v. Bos*. There is no case where between a sole child and the widow the advancement was brought into hotchpot. It is true

a father may purchase off a child's share, but that must be by agreement. *Garon v. Tippet*, Amb. Rep. 189.

^a 2 Will. 527.

¹ 2 Vern. 665.

(3) When the advancement shall have exceeded the child's share by the custom, it has been said, that if it have been given and accepted expressly in satisfaction of the customary share, no respect shall be paid to such advancement in the distribution of the dead man's part; but that where there is no such special contract or agreement, and the advancement is general, it shall be applied either to the customary share only, or both to the customary and distributive share, according to the amount of the advancement. Toller on Executors, 395. 4 Burn's Ecc. Law, 460.

child ; which child is advanced, or partly advanced, or not advanced ; in all these cases it makes no difference, for one way or other such child shall have the whole clear personal estate. For supposing such child is advanced, he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is partly advanced, he shall have one-half by the custom ; there being no other child with whom to bring his partial advancement into hotchpot, and the other half by the statute. So in like manner, if he is not at all advanced, he shall have one-half by the custom, and the other half by the statute.

If the freeman leaves no wife, but divers children ; as supposing them to be three, the first of which is advanced, the second partly advanced, and the third not advanced : in this case the child partly advanced, and the child not advanced, shall have one-half equally betwixt them by the custom ; the child partly advanced first thereunto bringing his partial advancement into hotchpot ; and the other half (which is called the dead man's part) shall be distributed by the statute equally between those two children, the first child being supposed to be fully advanced already.

As to the representatives of children dead ; those we must observe, are admitted by the statute to a distributive share of the dead man's part, in the place of the deceased child or children whom they represent ; but not so of the customary part by the custom :

If the freeman leaves a wife and no child ; she shall have besides her chamber, one half by the custom, and the other half (being the dead man's part) shall be distributed by the statute ; of which dead man's part by the said statute she shall have one half ; so that, dividing the whole personal estate into four parts, she shall have three, and the next of kindred one. But although there be no child of the freeman's living at his death, yet if there hath been a child, and there are any legal representatives of such child, that is lineal descendants ; then of the dead man's part, by the statute, the wife shall have but one-third, and the representatives shall have the other two-thirds ; so that, dividing the whole

personal estate into six parts, she shall have four, and the representatives two.

If the freeman leaves a wife, and also a child or children, any one or more of which children are not advanced ; by the custom she shall have one-third part, and the children not advanced shall have another third part, and the remaining third part (being the dead man's part) shall be distributed by the statute ; of which dead man's part by the said statute she shall have one-third, and the other two-thirds shall be distributed amongst the children : so that dividing the whole into nine, she shall have four, and they shall have five. But if the wife be barred by settlement, whereby it may be as if there were no wife ; then the children will have one-half by the custom, and the other half by the statute, as hath been mentioned^m.

The orphanage share not being fully vested in the children till they attain the age of twenty-one, a child entitled to an orphanage share of his father's personal estate dying under twenty-one, cannot devise it by his will ; for by the custom it survives to the other children, as hath been mentionedⁿ(4). But a child may devise the share which he hath by the statute of distributions^o ; and that at the age of fourteen, if a male, and twelve, if a female ; provided he or she be of sufficient discretion ; as it seems expressly laid down by Sir

^m Page 135.

^o 2 Vern. 559.

ⁿ Page 131.

(4) But if a man marry an orphan under the age of twenty-one, it seems his right is so vested as to prevent his wife's share from surviving to the other children, in case of her death, before she attains that age. 1 Vern. 88. Sed vide Prec. Chan. 537. And if there be only one child, the orphanage share is vested, and the orphan, though under twenty-one years of age, may, if a female of twelve, or if a male of fourteen years of age, or upwards, bequeath it. 3 P. Wms. 318. note (Q). Prec. Chan. 207. And in the latter case, should the orphan, being a male or female, die under the age of twelve or fourteen years respectively, or intestate, the orphanage part would go to his or her next of kin, according to the statute of distributions.

William Blackstone^p; and his reason given for^q it is, because that is the rule of the civil law, and that as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law; so that, as the learned author says, no objection can be admitted to the will of an infant of fourteen, merely for want of age; but if the testator was not of sufficient discretion, whether at the age of fourteen or four-and-twenty, that will overthrow his testament.

SECTION III.

The Custom of the Province of York as to Intestacy.

We have already seen, that here, as well as in the city of London, a man may by will dispose of the whole of his personal estate to whom he thinks fit, and that the claims of the widows, children, and other relations to the contrary, are totally barred^r. But as to intestacy; if a man be an inhabitant or an householder within the province of York (5), and dying there or elsewhere intestate, and at the time of his death hath a wife, and also a child or children; his goods (after paying his debts, and deducting the widow's apparel and furniture of her bed-chamber^r) shall be divided into three parts; whereof the wife ought to have one part, the

^p 2 Com. 497.

^q Page 130.

^r By the general and ancient custom of the province of York, widows have been tolerated to reserve to their own use, not only their apparel and a convenient bed, but a coffer with divers things therein necessary for

their own persons; which things have been usually omitted out of the inventory of their deceased husband's goods, unless the husband was so far indebted, as the rest of his goods would not suffice to discharge the same. Swinb. 422.

(5) It is to be observed, that this custom not having anciently prevailed in what is now the diocese of *Chester*, it does not at present extend to it. For the custom of *York* never attached upon any part of the province which was not so during the reign of *Henry VIII.*, and *Chester* was annexed thereto subsequently to that period. 3 Ves. 338.

child or children another part, and the third part (which is called the death's or dead man's part) is distributable by the statute; of which dead man's part, by the statute, the wife shall have one-third, and the other two-thirds shall be distributed amongst the children: so that, dividing the whole into nine parts, the wife shall have four and the children five; in like manner as has been mentioned concerning the custom of the city of London^a. But if by settlement a jointure is limited to the wife, in bar of all her demands out of the personal estate of her husband by virtue of the custom, in such case it is as if there were no wife with respect to the customary part; so if it is in bar of all her demands, by virtue of the said custom, *or otherwise*, she shall be debarred also of any distributive share by the statute^b. And as to the children; if the intestate hath a wife, and a child or children, which child is heir to the intestate, or which children were advanced by the father in his lifetime; in this case it is as if he had no child; and therefore his goods shall be divided into two parts; whereof the wife is to have one part to herself, and the other half is distributable by the statute^c, as we shall see more of hereafter. — If the intestate hath neither wife nor child at the time of his death, his whole personal estate (the funeral expences, and other necessary charges being first deducted) shall be disposed of in due course of administration, as now falling under the direction of the statute of distribution^d; and consequently must be distributed in such manner as was shewn in a former chapter^e.

As to the child's being excluded as being heir; this, we may observe, is one of the main points wherein the custom of the city of London and province of York differ; as in the former, whatever real estate the child has, either by descent from his father, or conveyed to him by his father in his lifetime, it will in no wise bar the child from receiving his share of his father's personal estate; whereas here he will be totally barred from receiving any part thereof *by the custom*,

^a Page 132.

^b 1 Vern. 15.

^c Swinb. 220.

^d Swinb. 220.

^e Chap. iii.

if he should have any real estate by descent, or otherwise, from his father. For here not only the heir of lands holden in fee-simple is thereby barred from the recovery of a filial portion, but he also that is heir in fee-tail, either general or special¹; and although the lands be of very small revenue, perhaps not more than a noble yearly rent, and the goods very great in comparison of so small a rent (as may be 1000*l.* or more;) even in this case the heir is barred from the hope of a filial portion²: and not only that heir is excluded from a filial portion who doth enter upon the land immediately after his father's death, but he also who is heir in reversion, is heir; and being heir, can have no filial portion: so by this it may fall out very hard with the heir in reversion; for if he should die in the mean time, before he could lawfully enter to those lands which be his only in reversion, he could reap no benefit either of his father's lands or goods; yet he must be content with his lot, and though not he, but his shall enjoy the land at the time appointed³. And although the heir receive the land by settlement made upon his father's marriage: yet he is heir so as to be excluded thereby from a filial portion; as where the father having by settlement on his marriage settled his real estate to himself for life, part to his wife for her jointure, and the remainder of the whole to his first and other sons in tail, remainder to his own right heirs; the eldest son was thereby excluded *by the custom of the province of York*, from having any share of his father's

¹ Estates tail may be either general: — or general to male or to female; — or special; — or special to male or to female. Tail general is, where lands and tenements are given to one, and the heirs of his body begotten. By which manner of bequeathing, how often soever the donee in tail marries, his issue by every such marriage is in successive order capable of inheriting the estate tail *per formam doni*, that is, by the form of the gift. If lands are given to a man, and the heirs male of his body begotten, it creates an estate in tail male general; and *vice versa*, an es-

tate tail female general. Tenant in tail special is, where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. As where lands and tenements are given to a man and the heirs of his body on *Mary his now wife to be begotten*; hereby no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife; and therefore it is called special tail. Black. b. ii. c. 7.

² Swinb. 231, 232.

³ *Ibid.* 231.

personal estate^b. And if the heir hold lands by deed of feoffment^c in mortgage, or with clause of redemption; that is to say, upon condition that if the feoffor pay unto him a sum of money at a certain day, that then the feoffer may re-enter, and the deed or grant be void; yet in the mean time, until the condition be performed and the land redeemed, if he should demand any filial portion he is barred; because as yet he is heir to the deceased. But if the lands should be redeemed, and the money satisfied, then it is thought that he may recover a filial portion; because then he is not heir to the deceased, nor the advancement certain which was made by the father in his lifetime^d (6).

Having thus seen how the heir may be barred from receiving a filial portion by having lands from his father by descent or otherwise; we come now to consider what advancement will bar a child from receiving a filial portion. But before we proceed with this, we may here just take notice, that what has been said concerning the heir being barred, relates solely to his being barred of what he would be en-

^b *Constable and Constable*. 2 Vern. 375.

^c A feoffment, or deed of feoffment, is the ancient method of conveyance. 2 Black. Com. 310. Yet since the statute of 27 Hen. VIII. c. 10. of uses, the conveyance by lease and release has taken place of it; and is become a very common as-

urance to pass lands and tenements; for it amounts to a feoffment, the use drawing after it the possession without actual entry, and supplying the place of livery and seisin required by the deed of feoffment. 2 Vern. 35.

^d Swinb. 232.

(6) When the heir, by the common law, takes lands from his father, not as heir at law but by a devise, expressed in such terms as to make him a purchaser, he shall not be debarred from the recovery of a filial portion, Swinb. 232.; for he may refuse or waive the bequest, and recover a filial portion according to the custom of the country. Ib. 233. Neither shall he be so debarred by the descent of copyhold, or, as it seems, of customary lands, upon him from his father. Ib. 232. And the youngest son, who is heir in borough-english, seems not to be heir, so as thereby to be debarred from a filial portion; for he is not heir according to the course of the common law, but by a particular custom. 4 Burn. Eccl. Law, 465.

titled to by the custom, and not what he will be entitled to by the statute; which may be perceived by what will be said hereafter.

As concerning the advancement, whereby a child may be barred from receiving a filial portion; this advancement must be by the father in his lifetime. For although another bestow any advancement, be it as much as it may, this preferment by another is no bar to the child from the recovery of a filial portion of his father's goods; much less where the child hath advanced his estate by his own industry^e. And if the father bestow any thing upon another for his child's sake, or for the good of his child; this is no such preferment as will hinder a child of his filial portion^f: and therefore if the father bestow any thing upon a man of trade, to take his son for an apprentice, and to teach him his mystery, this is no advancement to the effect aforesaid^g; or if the father bestow any thing upon a schoolmaster, or tutor in the university, for the increase of his child's knowledge in learning, or for any degree there to be obtained; this is no advancement to exclude the child of a filial portion^h.

The advancement must be a provision made by the father of some competent thing for the maintenance of his child, whereby he may be the better enabled to live after his father's death; for if the father bestow any thing upon his child to any other end, as money in his purse to spend among his equals, or to buy him suits of apparel or books; yet this is not to be holden for an advancementⁱ. — If a portion be given to a child in lieu and satisfaction of a filial portion, and the child be of age, and in consideration thereof doth release his future filial portion; then the child will be barred of any future claim: as a child when of age, for a valuable consideration, may release his future filial portion^k. — If the father in his lifetime bestow a lease upon his child, or grant unto him an annuity for life out of his lands, though it be in such a manner as the child shall not reap any benefit

^e Swinb. 233.

^f *Ibid.*

^g *Ibid.*

^h Swinb. 233.

ⁱ *Ibid.*

^k 4 Burn's Eccles. Law, 395.

thereby, so long as the father lives, but after his death; this is holden for a preferment or advancement: because it was assured unto him in his father's life-time¹. And if the father bestow a competent portion with his daughter in marriage upon him that shall marry her; this is such an advancement as will bar her from a demand of a filial portion^m. By the word portion is to be understood, not only a sum of money, or part of the father's goods and chattels; but also lands and annuities bestowed by the father upon the sonⁿ. — Competent, signifies equal, or not far inferior to that quantity which otherwise, according to the custom of the province, should fall to be due to the child, after the rate and proportion of the father's estate, at the time when he doth bestow any such thing upon his child; for the same being equal, or not much under the rate which should belong to the child by the custom, if his father had then died, shall stand for a sufficient preferment and advancement to exclude him from a filial portion^o.

It seems since Swinburn's days generally to have prevailed as the custom of the province of York, that children (exclusive of the heir at law) not advanced to their full proportion of the children's part, shall be admitted to come in for their share of the said children's part, bringing thereunto their partial advancements into hotchpot: agreeable to what Swinburn acknowledgeth to be the rule of the civil law; in conformity also to the custom of London, and to the measures of the statute of distribution, and the rules observed by the courts of equity in all such like cases^p.

Where there is a wife, child, or children, the course of distribution of intestates' effects within the province of York seems to stands thus:

If a person die intestate, leaving no wife, but an only child, which child is heir at law, or advanced, or partly advanced, or not advanced; in all these cases it makes no difference; for one way or other such child shall have the

¹ Swinb. 234.

^m *Ibid.*

ⁿ *Ibid.*

^o Swinb. 234.

^p 4 Burn's Eccles. Law, 402.

whole clear personal estate. For supposing such child to be heir at law; he shall have nothing by the custom, but by the statute he shall have the whole as next of kindred. If he is advanced; he shall likewise have nothing by the custom, but by the statute in like manner he shall have the whole. If he is partly advanced; he shall have one-half by the custom, there being no other child with whom to bring his partial advancement into hotchpot; and the other half by the statute. So in like manner, if he is not at all advanced; he shall have one-half by the custom, and the other half by the statute.

If such person hath divers children, one of whom is heir at law, and the others are advanced; in this case, with respect to the custom, it is as if he had no children; none of them can claim any thing by the custom; and (the younger children being supposed to be fully advanced) the heir at law by the statute shall have the whole. So here we may observe, as before hinted ^q, that as to the custom the heir at law is barred by having lands; yet by the statute he is in nowise barred by any lands that he may have had by descent or otherwise from the intestate; which we have seen in a former chapter ^r.

If such person hath divers children, the first of which is heir at law, the second advanced, the third partly advanced, and the fourth not advanced; in this case, the child partly advanced, and the child not advanced, shall have one-half equally betwixt them by the custom, the child partly advanced first thereunto bringing his partial advancement into hotchpot; and the other half (which is the dead man's part) shall be distributed by the statute equally amongst all the said children (the second only excepted, who is supposed to be fully advanced already,) share and share alike. But if the heir at law hath been advanced by his father, otherwise than by lands, or as heir at law, he shall bring such advancement into hotchpot with his brothers and sisters, otherwise he shall have no distributive share by the statute.

In respect of the dead man's part, which is distributable by the statute; we must observe as to this, that the represent-

^q Page 147.

^r Chap. iii. page 85.

atives of children dead are admitted to a distributive share in the place of the deceased child or children whom they represent ; but not so of the customary part by the custom.

If a man hath a wife and no child, she shall have (besides her convenient bed and apparel) one-half by the custom, and the other half (being the dead man's part) shall be distributed by the statute ; of which dead man's part by the said statute she shall have one-half, and the other half shall go to the next of kindred to the deceased in equal degree ; so that, dividing the whole into four parts, she shall have three, and they shall have one. But in respect to the dead man's part, although there be no child, yet if there hath been a child, and there are any legal representatives, that is, lineal descendants of such child ; then of the dead man's part, by the said statute, the wife shall have but one-third, and the representatives shall have the other two-thirds ; so that, dividing the whole into six parts, she shall have four and they shall have two.

If a man hath a wife, and also a child or children, one of which children is heir at law, and the others are advanced ; in this case, with respect to the custom, it is the same as if he had no child ; and consequently the wife shall have one-half by the custom, and the other half (being the dead man's part) shall be distributed by the statute ; of which dead man's part, by the said statute, she shall have one-third, and the other two-thirds shall go to the heir at law ; so that, dividing the whole into six parts, she shall have four and he shall have two.

If a man hath a wife, and also a child or children, any one or more of which children are not advanced ; by the custom she shall have one-third part, and the children not advanced shall have another third part, and the remaining third part (being the dead man's part) shall be distributed by the statute ; of which dead man's part, by the said statute, she shall have one-third, and the other two-thirds shall be distributed amongst the children ; so that, dividing the whole into nine, she shall have four and they shall have five.

To illustrate this, let us here for example suppose a man inhabiting within the province of York, dies intestate, leaving a clear personalty of 9000*l.*; and leaving a widow and four children; the first being heir at law to freehold lands, and having received likewise of his father in his lifetime 400*l.* to set him up in trade; the second advanced to the amount of 3000*l.*; the third partly advanced to the amount of 600*l.*; and the fourth not at all advanced. The question is, how this personalty shall be distributed? First of all, the widow shall have one-third part by the custom, as her widow's portion, to wit, 3000*l.* Another third part by the said custom shall be distributed amongst the children; of which the heir at law (as such) by the said custom, is excluded from recovering any share; the second son also, as being fully advanced, is excluded; but hereunto the third son shall bring his partial advancement of 600*l.* into hotchpot, and then the third and fourth sons shall divide the 3600*l.* equally between them; but the real benefit thereof to the third son will be but 1200*l.* and to the fourth son 1800*l.* The remaining third part of the said personalty, which is the dead man's part, shall be distributed by the statute; of which, by the said statute, the widow shall have one-third, to wit, 1000*l.*; and the residue, being 2000*l.* shall be distributed equally amongst the said three children, viz. the heir at law, and third and fourth sons (the heir at law being let in for so much by the statute; and the second son being still excluded, as having received more than his just proportion of his father's whole personal estate;) but hereunto the heir at law shall first bring his partial advancement of 400*l.* into hotchpot, and so the said three children shall divide the whole 2400*l.* equally amongst them; but the real benefit thereof to the heir at law will be but 400*l.* and to the said two younger children 800*l.* each. So that of the whole clear personalty of 9000*l.* the widow shall have 4000*l.*, the heir at law 400*l.*, the second child nothing, the third child 2000*l.*, the fourth child 2600*l.*, which added together make the 9000*l.* But if by settlement a jointure is limited to the wife, in bar

of all her demands out of the personal estate of her husband, by virtue of the custom or otherwise, she will be debarred of any share, either by the custom or statute; and in such case it will be as if there were no wife, as has been mentioned^t; and consequently the children must have the whole.

By this custom, the customary share which the children are entitled to vests in them immediately on the intestate's death; quite different to the customary share which the children of a freeman of London are entitled to by the custom of London, which does not vest in them till they are twenty-one years of age; wherefore, until they attain that age, they cannot dispose of it by will; and if they die under that age their share survives to the other children, as has been shewn^u. But here, the customary share vests immediately on the intestate's death, as doth the share the children are entitled to by the statute of distribution; so that the whole is vested in them immediately on the intestate's death, and being so vested, in case either child dies under age, and without will, the share of such child will fall under the statute of distribution, and go according to the course of distribution treated of in a former chapter^w. And if the infant be of the age of fourteen, if a male, or twelve, if a female, he or she may dispose thereof by will; as has been before-mentioned concerning what an infant is entitled to by the statute of distributions^x. — That a male infant may make a will, and thereby dispose of his goods and chattels at the age of fourteen, and a female at the age of twelve years, seems generally so to be allowed as not to admit of a doubt; provided they be of sufficient discretion. But as to real estates, by the statute 34 & 35 Hen. VIII. c. 5. sect. 14. wills or testaments made of any manors, lands, tenements, or other hereditaments, by any person within the age of 21 years, shall not be good or effectual in law; yet by this statute, and the statute 12 Car. II. all persons of sound mind (except infants and married women) are enable to dispose by

^t Page 146.

^u Page 132.

^w Chap. iii.

^x Page 144.

will in writing of their whole landed property (except their copyhold tenements), concerning which particulars we shall treat in the subsequent part of our work, and therewith begin the ensuing chapter.

SECTION IV.

Observations on the Use and Benefit a Will may be to a Man's Family or Relations.

HAVING just now shewn that every man is at liberty to make a will, and thereby to dispose of his real estate, and in a former part of our work, that he may by will dispose of the whole of his personal estate to whom he thinks fit; likewise that infants at the age of fourteen years, if males, and twelve if females, may make wills, and thereby dispose of their personal estate; we shall here make some brief observations on the use and benefit the same may be to such of a man's family or relations who would be legally entitled to his estate and effects, in case he died intestate. And to this end we will first suppose a man to have relations, several of whom may be entitled to the administration of his estate, and he makes his will, and appoints one or more executors, and thereby gives his relations his personal estate, just in the same proportion as the law would entitle them thereto in case he had died intestate, and left it to the disposition of the law: now by means of the will, for which some at first sight may be apt to think there was little occasion, much altercation may be prevented; as thereby all disputes and controversies concerning who should have the administration will be totally excluded, no room being left for dispute; and therefore it is probable very considerable expence will be saved: for, as we have seen in the first chapter of this book, there may be room for contending who should, and who should not have the administration; and in the second chapter, we may perceive there are many

circumstances that might excite those entitled thereto, rigorously to contend for it; which has too often been the case, and the determining who should have the administration has been attended with such expense and detriment to the parties concerned, as ultimately to render the intestate's personal estate of little or no benefit to them.

Next let us suppose a man to die intestate, leaving a wife and several children who are of age, and equally entitled to the administration with their mother; yet all amicably agree to suffer their mother alone to administer their deceased father's estate; and that one or more of those children have been advanced by their father, either in part or to the full amount of their share of his personal estate. Now although those children may all have amicably agreed to suffer their mother to administer, yet it may not only require some consideration for the administratrix to ascertain this advancement, and so to make a just and equal distribution amongst them, pursuant to the statute of distribution; and, if the intestate be a citizen of London, or an inhabitant of the province of York, where the customs interfere with the statute, to make distribution pursuant to those customs and the statute; but it will probably require much more consideration, as well as a deal of pains and trouble for the administratrix, after she has allotted each of those children their lawful share, to convince them that it is the whole each can demand; so that all may be satisfied of justice being done, and thereby be prevented from calling in the aid of counsel, or some person learned in the law, if not the aid of a court of equity, to satisfy them respecting their shares of their deceased father's estate; which latter aid having been often required when the former could not satisfy, the consequence has been, that considerable sums of money have been spent in litigation, and that not only to the great loss, but even to the utter ruin of some of the intestate's children; which might totally have been prevented, had he made a will with good advice, as by the assistance of some person sufficiently versed in the law.

Again, let us suppose a man to die intestate, leaving no wife, but a child or children, who may not be of the age the law requires to administer his estate. Here as concerning the personal estate, the ordinary assigns some person to take care thereof, and to provide for the infant's maintenance and education. Whereas the father might by will have vested his estate in one or more of his judicious friends to have taken care thereof, and to have disposed of it at such times and in such manner as he might have directed; by which means he would not only have had one or more persons of his own choosing to take care of his estate for his children, and to distribute it to them according to his own direction, but would have saved the expence which the ordinary's assignment is attended with, and which ceases when either child attains twenty-one years of age, on which a new administration is granted; the expence whereof, as well as of that which ceases, is somewhat more than the expence of general letters of administration: so that in this case here is perhaps more than double the expence to come out of the deceased's estate than the proving his will (if he had made a will) would have been attended with; and probably much greater expence than this may be occasioned, by the children, when of age, calling the person assigned by the ordinary to account, and in getting his account settled and adjusted.

Concerning the utility of a will, and the benefit it may be of to a man's family or relations, much more might be said; as any person, after reading this work may clearly perceive, and thereby see that such advantage may redound to a man's family or relations by a will, as to be convinced that the small expence of employing counsel, or a person sufficiently versed in the law for making it, is not an object to be compared with the hazard of litigation that might be occasioned by a person dying intestate; and the loss and detriment his family or relations may thereby sustain. — By a will made with good advice, or by the assistance of a person sufficiently

² 1 Black. Com. 461. 463.

versed in the law, the testator's estate may be given and disposed of so as not to leave the least room for dispute or litigation; yet if the will be not made with good advice, it may be attended with as bad consequences as if the testator had died intestate, and left his estate to the disposition of the law; and this is obvious to every person who has been conversant with the books of report, or hath attended the courts of justice; and it is observed by Sir William Blackstone*, that an ignorance of the forms which the policy of the laws hath made necessary for the wording of last wills and testaments, and of the attestation, must be of dangerous consequence to such as compile their own testaments without any assistance; and that those who have attended the courts of justice, are the best witnesses of the confusion and distresses that are thereby occasioned in families, and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all; so that in the end his estate may be vested quite contrary to his intentions; because he has perhaps omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

As an illustration of these observations will appear in the ensuing part of this work, where the testator has such instructions for making his will, as by due attention thereto he may be assisted and enabled to make it with accuracy, unless his estate should be so fettered with intails, or entangled by settlements or conveyances, as to render him incapable of forming a just conception thereof, and under such circumstances, as well as when the estate is of very considerable value, it is advisable for him to apply to counsel, or some person well versed in the law, for further information; we shall now conclude this part of our work, by just mentioning that as it hath been presumed, where a will has been made contrary to the interest and inclination of some of the testator's family or relations, the same unknown to him has been

* 1 Com. 7.

destroyed before his death, or concealed afterwards: and thereby, notwithstanding the care he may have taken to dispose of his estate and effects, the same have been left to the disposition of the law; for preventing such misfortune we may observe Lord Coke's advice; which is to make two parts of the will, and to leave one part thereof in the hands of a friend^b; either of which parts may be proved, and hereby the testator's will may be secured; and if he should have a mind to cancel it at any time before his death, this will in no wise prevent or hinder him from so doing; no more than if there was only one part. For the cancelling of one part, when the same is done with an intention to destroy the will, is as the cancelling of both, and a good revocation of the whole will^c.—Where the estate and effects are of any considerable value, this method of making the will in two parts, and leaving one part thereof with a friend, is commonly used.

^b Co. Rep. 36.

^c 1 P. Will. 346. note 1. 4th edit. The destroying the will by cancelling the duplicate, depending on its being done with a mind or intention to revoke (unless the testator makes another will, and thereby effectually revokes the former, concerning which we shall treat in a subsequent part of our work,) it

would be well for him at the time of cancelling the duplicate to mention his intention to some disinterested person, or to make a memorandum thereof in writing, which might be subscribed by witnesses, similar to the form we have, in a subsequent page, laid down for republishing a will.

THE
DISPOSAL
OF
A PERSON'S ESTATE
BY
WILL AND TESTAMENT.

CHAPTER I.

OF THE POWER A MAN HATH FOR DISPOSING OF HIS PROPERTY BY WILL. — WHAT HE MAY NOT DISPOSE OF BY WILL. — ESTATES TO BE SO DISPOSED OF AS NOT TO BE RENDERED UNALIENABLE AFTER A CERTAIN TIME.

IN the former part of this work it has been shewn, that all persons may by will dispose of their personal estate to whom they think fit ^a; and that male infants, if they are of sufficient discretion at fourteen, and females at twelve years of age, may dispose of their personal estate by will ^b. Personal estate is generally understood in contradistinction to real estate, as money, goods, and chattels, particularized in the second section of the second chapter of the Law's Disposal, and there shewn by what will go to the administrator ^c. As to real estate ^d, by statute 34 & 35 Hen. VIII. c. 5. and by virtue of the statute 12 Car. II. c. 25. all persons (except married women, infants, idiots, and persons of non-sane memory) are empowered to dispose by will in writing of the whole of their landed property (except their copy-

^a Page 129.

^b Page 144. 154.

^c Page 33—44.

^d Defined, page 108.

hold tenements) to whom they think fit, unless it be to bodies corporate^e; and that even to the total disinherison of the heir at law, notwithstanding that erroneous opinion which some entertain of the necessity of leaving the heir a shilling, or some other express legacy, in order to disinherit him effectually.

Thus has the legislature enabled persons to dispose of their landed property to any person or persons, except it be to bodies corporate, the reason of which exception will be shewn hereafter. And as to freehold estates held by one person during the life of another, styled estates *pur autre vie*, those are also devisable by will, as may be perceived by what has heretofore been mentioned^f. But no provision being yet made with respect to copyhold estates, the power of devising is now indirectly exercised over those by an application of the doctrine of uses similar to that which was anciently resorted to in respect to freehold lands; for the practice is to surrender to the use of the owner's last will, and on this surrender the will operates as a declaration of the use and not as a devise of the land itself^g. So from hence we may observe that the testamentary power is now exerciseable either directly or indirectly over land of every tenure now in use, where the same is not held in jointtenancy, or fettered with intails of which we shall hereafter make mention. But with respect to land, or real estate, it must be observed, that a devise will not operate thereon, unless the testator is in possession thereof at the time of executing his will; yet as to personal estate it will operate upon whatever a man has thereof at the time of his death, concerning which we shall see more in a subsequent chapter.

Where there is a general devise of lands, and there is no surrender of the copyhold lands to the use of the will, the construction at law is, that those do not pass by the will; copyhold lands not being properly the subject of a devise, and

^e 2 Black. Com. 375, 376.

^g Co. Litt. 111. note 1. 13th edit.

^f Page 62.

therefore do not pass by the will, but by the surrender^b (1). So if I would devise a copyhold estate I must surrender it to the use of my will, otherwise after my death application must be made to a court of equity for supplying the defect thereof, which the court will do in some cases, as in favour of a *child* or *widow*, and in favour of creditors where there is a devise of real estate to pay debts, and there is no real estate but copyhold¹. And a surrender of copyhold estate hath been supplied for creditors, though there was freehold specifically devised by the same will^k.

^b 1 Atkyns, 388. In a case before Sir *Loyd Kenyon*, master of the rolls, sitting for lord chancellor, his honour determined that a mere draught of a will, the signing and publication whereof were prevented by the sudden death of the testator, yet being proved in the ecclesiastical court as a testamentary paper, was

sufficient to pass copyholds, which the testator had before surrendered to the use of his will. 2 Bro. Ca. Rep. 58.

¹ Law of Test. 171. 4 Burn's Eccles. Law, 59.

^k *Bisby v. Eley*. 2 Bro. Cha. Rep. 325.

(1) The necessity of a surrender in order to render a devise of copyhold lands effectual is now dispensed with, and consequently, the equitable doctrine of supplying surrenders, which is discussed in the text, is no longer a subject of useful enquiry. By statute 55 Geo. III. c. 192., it is enacted, "that in all cases where by the custom of any manor in England or Ireland any copyhold tenant of such manor may by his or her last will and testament dispose of or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made or to be made by any such last will and testament, by any person who shall die after the passing of this act, of any such copyhold tenements, or of any right, title, or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will." This, statute, however, only supplies the want of a mere formal surrender, and not of a surrender which is matter of substance. *Doe d. Nethercote v. Bartle*, 5 Barn. & Ald. 492.

Where the real estate generally is devised for, or charged by will with, payment of debts, copyhold lands, which are not surrendered to the use of the will, do not pass thereby, if there be freehold sufficient to answer the purpose; otherwise, the copyhold shall pass, and the court will supply the surrender. Yet the freehold, if any, shall be first applied: but this is to be understood of the *legal* estate only, for an *equitable* estate of copyhold will pass by such devise without surrender¹; as where a copyholder has mortgaged his copyhold and the mortgagee is admitted, the mortgagor, not having the *legal* estate of copyhold in him, has no estate that he can surrender, and therefore may devise the copyhold premises without any surrender^m, as also he may where the *legal* estate is in trusteesⁿ.

A surrender shall be supplied for a limited interest (a wife for life) though the devisees over (nephews and nieces) are not entitled to have it supplied for them^o. And a surrender will be supplied for a wife against a distant heir (a nephew) not provided for by the testator^p. And for children wherever the heir is provided for, though the provision be not from the testator. — If there be a custom in a manor, that copyhold shall not be surrendered to the use of a will, such custom is bad^q. — Where the testator by his will, taking notice that he had not surrendered copyhold estates, which he devised, but directing his son to convey them, and devising to the son other estates, though the copyholds were not devisable by custom, the surrenders were decreed to be made. And lord chancellor was clearly of opinion that, though those copyholds were not devisable by the custom, yet, as the testator might dispose of them, and had marked his intention so to do, that brings it within the principle upon which the court proceeds in supplying surrenders for payment of debts or provisions for youngest

¹ 3 P. Will. 98. note 2. 4th edit.

^m *Ibid.* 360. note 1.

ⁿ 2 Atk. 38. 1 Bro. Cha. Rep. 481.

^o *Marston v. Gowan*, 3 Bro. Cha. Rep. 170.

^p *Chapman v. Gibson*, *Ibid.* 229.

^q *Pike v. Pike*, *Ibid.* 286.

children, which are considered as meritorious considerations ; and decreed the surrender prayed by the bill ^r.

Concerning infants, married women, idiots, and persons of nonsane memory, more will be said hereafter under a subsequent head ; and here we may observe, that notwithstanding the law has given a man a large and extensive power for disposing of his property by will, yet there are some estates and effects which he may by *deed* or otherwise dispose of in his lifetime, but is not allowed to dispose thereof by will ; and those shall be our next subject.

And here we shall first advert to what has been mentioned in the former part of this work, that all such chattels personal as a woman is possessed of, immediately on marriage vest in her husband ; and that her chattels real he may make his own if he pleases^s. The former of those he may dispose of by will to whom he thinks fit ; but the latter, unless he exercised some act of ownership to make them his own, as in case of leasehold estates for years, or for years determinable upon lives, he surrender the leases, and take new leases, or sell the estates and repurchase them, otherwise those will not pass by his will, but on his death will return to his wife ; yet if he survives her, they will be his own to all intents^t. So it will be in respect of any debts that were due to the wife before marriage, and which were not received or got in by the husband and wife during their joint lives. So likewise it will be in respect to the wife's *paraphernalia* described in the former part of this work^u.

And in case of joint-tenancy, if any estate either real or personal is held in joint-tenancy, it cannot be devised by will ; or a devise of an estate whereof the devisor is jointly seised is void, the will not taking effect till after the death of the devisor, and by his death all the estate presently comes by the law to his companion who surviveth^w, and who takes the whole by prior title^x. — The nature and

^r *Wardell v. Wardell*, 3 Bro. Cha. Rep. 116.

^s Page 3.

^t 4 Co. Rep. 51.

^u Page 42.

^w Co. Lit. 185, 186.

^x Gilb. on Wills, 123.

effects of joint-tenancy being very necessary to be understood, I shall here be somewhat particular in describing it; and then shew how a joint-tenant may obtain power for devising his part by will. Joint-tenancy is where two or more persons come to and hold an estate jointly by one title, and those persons are called joint-tenants, because the estate is conveyed to them jointly; as where a man seised or possessed of an estate in fee-simple, makes a conveyance to two or more and their heirs, or makes a lease to them for life, or where two or more have a joint estate in a chattel real or personal, or a joint-estate in a debt, duty, covenant, contract, &c. it is a joint-tenancy, and the part of him that dies, goes not to his heir, executor, or administrator, but the whole to the survivors or survivor⁷; and a will made by a joint-tenant during the continuance of the joint-tenancy is not a good will, even as to his share of the estate under the statute of wills, notwithstanding a subsequent severance of the joint-tenancy by a partition made *after* the making of the will and *before* the testator's death, unless there be a republication of it after the partition⁸ (2). But as to joint merchants for the wares, merchandizes, debts, or duties, that they have as joint-merchants, or partners, the same shall not survive, but shall go to the executors or administrators of him that dieth, by the law of merchants, which is part of the laws of this realm for the advancement and continuance of commerce and trade, as being for the public good⁹. And for the encouragement of husbandry

⁷ 2 Black. Com. 399.

⁸ Co. Litt. 182.

⁹ Burr. 1488.

(2) A joint-tenant, while such, cannot devise although he survive, for until he has survived he has not any *devisable* interest. After he has survived he has a several seisin, and is then competent in point of ownership to make an effectual will. The owner of an estate in joint-tenancy may acquire a power of alienation by *will*, by severing the joint-tenancy; and this should be done as a preliminary step, before any attempt is made to devise. Watk. Pr. Conv. (ed. Preston) 82.

and trade, it is held, that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking by way of partnership in trade, shall always be considered as common and not as joint-property, and there shall be no survivorship therein^b. So that it may be in the power of the joint-merchant, joint-trader, or farmer, to devise his share by will; and in case he dies without will, the same shall go to his administrators: and the surviving partner is considered in equity barely as a trustee for the representatives of the deceased: upon which footing the accounts must be taken, and nothing considered as the share of the survivor till afterwards; because of the continuance of the property in the stock to the representatives of the deceased partner, who has a specific lien thereon, although the survivor afterwards dies or becomes bankrupt^c.

In order to shew how one joint-tenant may obtain power to devise his part by will, we may first take notice of the difference between joint-tenants and those called tenants in common; and then proceed to shew how a joint-tenancy may be turned into a tenancy in common by either of the tenants, and from that brought into a separate estate. Joint-tenants have the estate by one joint title and in one right, and tenants in common by several titles, or by one title and by several rights, but this property is common to them both, *viz.* that their occupation is undivided, and that neither of them knoweth his own separate part^d, both having a unity of possession, so that neither tenant is possessed of any particular part of the estate, but each hath a share in and throughout the whole; and, as has been observed, an estate held in joint-tenancy goes to the survivors or survivor, and never descends to the heir nor goes to the executor or administrator of the deceased, except in the case of joint-merchants, traders, &c. But of an estate held by a tenancy in common, either of the tenants may dispose of his part to whom he pleases by will, and the devisee or devisees to

^b 2 Black. Com. 399.

^d Co. Litt. 182.

^c MSS.

whom the same is devised will have a good title thereto; and in case the estate is not devised by will, and one of the tenants thereof dies intestate, his share will descend or go to his issue or next of kin ^e.

The creation of an estate in joint-tenancy depends on the wording the deed or devise by which the tenants claim title; for this estate can only arise by purchase ^f or grant, that is, by the act of the parties, and never by mere act of law ^g. If an estate be given to two or more persons without adding any restrictive, exclusive, or explanatory words, as if an estate held in fee-simple be devised to A and B and their heirs: this makes them joint-tenants in fee thereof; so if it be given to A and B for their lives, it makes them joint-tenants for life. So if a chattel real, as a leasehold estate for years, or any chattel personal, as a horse, a piece of plate, or any household goods, be given to two or more persons without adding any restrictions, exclusions, or explanatory words, they are joint-tenants thereof. A tenancy in common may be created by express limitation, but care must be taken not to insert words which imply a joint-estate; but as in this respect there is great nicety in wording of wills as well as deeds, it is the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate, whether real or personal, to A and B [*the persons to whom it is limited*] to hold *as tenants in common, and not as joint-tenants* ^h.

Joint-tenancies may at any time be turned into tenancies in common at the election of either of the joint-tenants; for if one joint-tenant aliens or conveys his estate to a third person, the joint-tenancy is severed and turned into a tenancy in common; for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent grantor;) and if a joint-tenant in fee makes a lease for life of his share, this

^e Hawkins's Abr. Co. Litt. 267.

^g 2 Black. Com. 180.

^f The word purchase is defined.

^h Ibid. 194.

defeats the jointure¹; so if there be three joint-tenants and one of them aliens to another that which to him belongeth, in this case the alienee is tenant in common with the other two joint-tenants, but the other two are seised of the two parts which remain jointly, and of these two parts survivorship will take place^k; and if one of the three joint-tenants leases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure^l. When a joint-tenancy is turned into a tenancy in common, any of the tenants in common, as has been before observed, may devise their share by will, or the same if not devised will descend or go to their issue or next of kin; yet the devisees or issue will not have an estate in severalty or any separate estate; but will still be tenants in common, and till partition made, the unity of possession will continue; for there are only two ways by which estates held as tenancies in common can be dissolved; the one is by uniting all the titles and interest in one tenant by purchase or otherwise, whereby the whole may be brought to one severalty, or the whole estate vested in one of them; the other is by making partition^m; which if they mutually agree, they may make when they please between themselves; but if they cannot mutually agree to divide, they may have recourse to the writ framed upon the statutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. whereby all joint-tenants and tenants in common, either of estates of inheritance or other less estates, are compellable to make partitionⁿ.

From hence we may perceive, that a man by his own act may obtain power for disposing by will of his share in the estate which he held in joint-tenancy. So where a man is seised of such estate in fee-tail as by virtue of a fine or recovery may be conveyed, of which mention is made in the appendix to this work; he may obtain power to devise the same by will. But if the joint-tenant, or tenant in tail, make

¹ 2 Black. Com. 185, 186.

^k Co. Litt. 189.

^l 2 Black. Com. 186.

^m 2 Black. Com. 194.

ⁿ *Ibid.* 185.

his will before severance of the joint-tenancy, or barring the entail, the devise will be void; therefore if the joint-tenancy be afterwards severed, or the intail barred, the testator should republish his will, as thereby the same may be made effectual for passing the estate. With respect to dower, mentioned in the former part of this work, we may here, by way of reminding the reader of what has heretofore been said concerning it, just observe, that a wife cannot be barred thereof by her husband's will, unless after his death she accepts of any thing given her thereby as in lieu or satisfaction for her dower (3).

(3) The general doctrine on this subject, upon which all the cases agree, has been stated as follows: the right to dower being in itself a clear legal right, an intent to exclude it must be demonstrated by express words, or by clear and manifest implication; the instrument must contain some provision inconsistent with the assertion of the right to demand dower. It must appear there is a repugnancy between the two claims, or the wife will not be put to elect between them. *Arnold v. Kempstead*, 2 Eden, 236. *Strahan v. Sutton*, 3 Ves. 249. *Birmingham v. Kirwan*, 2 Sch. & Lef. 444. *Lord Dorchester v. Earl of Effingham*, Coop. 319. *Greatorex v. Cary*, 6 Ves. 615. *Chalmers v. Storil*, 2 Ves. & Bea. 222. *Miall v. Brain*, 4 Madd. 119. *Butcher v. Kemp*, 5 Madd. 61. There has, however, been a considerable difference of opinion as to the application of this rule to the case of a devise of an annuity to the widow charged upon the real estate. The first case in which the question arose, (for the early cases merely decided that the gift of an estate to another person did not exclude the wife from claiming dower) was that of *Pitts v. Snowden*, before Lord Hardwicke, cited 1 Bro. C. C. 292. His Lordship there held, that a devise to the widow of an annuity, with a clause of entry, did not bar her of her dower. This was followed by *Arnold v. Kempstead*, 2 Eden, 236., in which Lord Northington determined against the claim of the widow, and held that she must elect to take either her dower or under the will. The next case was *Villareal v. Lord Galway*, Amb. 682. S.C. 1 Bro. C. C. 292. before Lord Camden. His Lordship having the two conflicting authorities before him, adopted the opinion of Lord Northington, and was

Having thus shewn what a man may, and what he may not dispose of by will, we come now to treat on the disposal of estates in such manner as the same may not thereby be rendered unalienable after a certain time.

Although, as it has been observed, a man may by will dispose of his landed property to whom he thinks fit, and that even to the total disinherison of the heir at law, yet he must dispose of it in such manner as that it may be aliened or conveyed within such time as the law hath fixed; in order that it might thereby be rendered capable of answering the purposes of commerce, and providing for the innumerable contingencies of private life^o; and therefore the estate

^o 2 Black. Com. 174.

afterwards followed by Sir *Thomas Sewell*, in *Jones v. Collier*, Amb. 730. and by Mr. Justice *Buller*, in *Wake v. Wake*, 3 Bro. C. C. 255. S. C. 1 Ves. jun. 335. The opinion of Lord *Hardwicke*, on the other hand, in favour of the claim of dower, has been adopted by Lord *Rosslyn*, in *Pearson v. Pearson*, 1 Bro. C. C. 292., by Lord *Thurlow*, in *Forster v. Cook*, 3 Bro. C. C. 347., and received considerable countenance in the elaborate judgment of Lord *Alvanley* in *French v. Davies*, 2 Ves. jun. 572. His Lordship, however, did not go the length of giving any determination upon the subject; that case only deciding that an annuity claimed out of a mixed fund, composed of the real and personal estate, did not bar the widow. In another case, *Greator v. Cary*, 6 Ves. 615., which, however, did not meet with a very full discussion, the like point, as to the claim out of a mixed fund, was again decided by Lord *Alvanley* in the same manner. In the last case upon this subject, *Miall v. Brain*, 4 Madd. 119., Sir *John Leach* held that the gift of an annuity would not bar the widow of dower, unless it was the clear intention of the husband to exclude her from it. From the more recent date of the decisions in favour of the claim of dower, it seems probable that a stronger indication of intention would now be required in order to put the widow to her election, than the mere devise of an annuity with a power of entry to enforce the payment of it.

must not be so devised as to create what the law calls a perpetuity. As where a devise was made to the Drapers Company and their successors in trust, to convey the estate to the devisor's grandson *Matthew Humberston* for life, and afterwards, on the death of the said *Matthew*, to his son for life, and so to the first son of that first son for life, &c., and if no issue make of the first son, then to the second son of the said *Matthew Humberston* for life, and so the first son, &c., and in failure of such issue of the said *Matthew*, then to another *Matthew Humberston* for life, and to his first son for life, &c. with remainders over to many of the *Humberstons* (as the reporter thinks about fifty) for their lives successively, and their respective sons, when born, for their lives, without giving any estate in tail to any of them, or making any disposition of the fee. This case being brought before the court of chancery, it was held by Lord Cowper, that this attempt to make a perpetual succession of estates for life, was vain and impracticable, and that there ought to be a strict settlement made; and the intent of the testator followed as far as the rules of law would admit; and his lordship directed a settlement to be made, so that such who were in being should be only tenants for life; but where the limitations was to a son not in being, there he must be made tenant in tail^p. who, when of age, may be enabled by suffering a recovery, if not by passing a fine, to sell and convey the inheritance, which a tenant for life cannot alone obtain power to do, as will be shewn in the appendix to this work, as also how real estates may be devised with remainders in tail.

With respect to executory devises, a brief description whereof we shall see hereafter; the utmost length that has been hitherto allowed for the contingency of an executory devise to happen in, is that of a life or lives in being, and one-and-twenty years afterwards; as when lands are devised to *such* unborn son of a feme-covert as shall first attain the age of twenty-one, and his heirs; the utmost length of time that

^p 1 Gūb. on Wills, 159. Law of Test. 155. 1 P. Will. 333. note 1. 4th edit.

can happen before the estate can vest, whereby the inheritance may be aliened or conveyed, being the life of the mother and the subsequent infancy of her son (4).

As to chattels real ^q, which may be devised with limitations over; in order to prevent the danger of perpetuities, it has been settled, that those may be devised to one for life, and after his death to another for life, which is termed limiting over, and so to as many persons as are in being; but all the persons must be in being during the life of the first devisee, or person to whom first devised, as then all the candles are lighted and consumed together, and the ultimate remainder, as it is termed, is in reality only to that remainder-man who happens to survive all the rest: or, that such remainder may be limited to take effect upon such contingency only as must happen (if at all) during the life of the first devisee ^r.

Limitations of chattels personal, in remainder after a bequest for life, are in like manner permitted, though formerly that indulgence was only shewn where merely the use of the goods, and not the goods themselves, was given to the first legatee, the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded; and if a man, either by deed or will, gives or devises his books or furniture to A for life, with remainder after the death of A to B, this remainder to B is good ^s; and it has been held that B might exhibit a bill against A to compel him to give security that the goods shall be forthcoming at his decease. But, by Lord Thurlow, in a late case: The cases as to tenant for life giving security for the goods have been overruled, and the court now demands only an inventory, which is more equal justice; as there ought to be danger, in order to require security ^t. With respect to bequests of

^q Described page 34.

^s 2 Black. Com. 398.

^r Law of Test. 82. 2 Black. Com. 174.

^t *Foley & Burnel*, 1 Bro. Cha. Rep. 279.

(4) See on this subject an elaborate note by Mr. *Sugden*, in his edition of *Gilbert on Uses and Trusts*, p. 260.

chattels with limitations over, we must observe, that where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analagous to the fee-simple which a tenant in tail may acquire in a real estate^w. So, upon the same principle, if a sum of money is intailed, all subsequent limitations over will be barred^w.

And upon this principle the resolutions have been concerning chattels bequeathed to go as heir-looms; as where Lord Foley by will bequeathed all his plate, china, &c. which should be at Stoke, Whitley, or Foley-House, *to be held and enjoyed by the several persons who from time to time should respectively and successively be entitled to the use and possession of the same houses respectively, as, in the nature of heir-looms, to be annexed, and go along with such houses respectively for ever*. A son being born who was tenant in tail of one of the houses (subject by the will to his father's life-estate therein) the chattels so bequeathed were held to vest in him at his birth, and he dying, to vest in his father as his personal representative. — By Ashurst, lord commissioner. The general rule is, that where the chattel interest comes to one who would be tenant in tail of land, the limitations over are void. — There is also another rule that the interest may be so given as not to vest absolutely in the first taker. Where the testator leaves it to the court to make the conveyance, the court will protect the property as far as may be; here he has taken upon him to be his own conveyancer. The chattels are to accompany the estate. — When a tenant in tail comes into *esse* [being] it must vest; otherwise the absurdity must happen of the personal estate being tied up longer than the real. We can only adopt so much of the

^w 2 Black. Com. 398.

^w 4 Burn's Eccles. Law, 144.
2 Bro. Cha. Rep. 33. 127.

testator's intent as was legal. It must follow the rule of law; and a person becoming tenant in tail must have the absolute interest in the personal property^x.

So where the testator directed "that all his plate, china, &c. which should be in his house at Hanbury Hall, should go as heir-looms with his real estate, and be held and enjoyed by the person or persons, that shall, for the time being, by virtue of his will, be entitled to his said real estate, as far as the rules of law and equity will permit, and directed an inventory to go with the estate;" the same were decreed to vest in the first tenant in tail who came into being, and on his death to vest in his father as his personal representative^y. (5).

^x *Foley v. Burnel*, 1 Bro. Cha. Rep. 274. Decree affirmed in the House of Lords, April, 1785. ^y *Vaughan v. Burslem*, 3 Bro. Cha. Rep. 101.

(5) The decisions in the cases of *Foley v. Burnel*, and *Vaughan v. Burslem*, cited in the text, have been followed by *Fordyce v. Ford*, 2 Ves. jun. 536.; *Carr v. Lord Errol*, 14 Ves. 478. *Stratford v. Powell*, 1 Ball & Beat. 1.; and it is now indisputably settled, not only that there can be no gift over of chattels after a gift in tail, but that a person not *in esse* at the date of the will, cannot take a life-interest only. And Sir William Grant has considered it clear that there can be no difference whether the estate tail be created by express words, or by words which are construed only to create an estate-tail. *Brouneker v. Bagot*, 1 Meriv. 281. A case which was much considered, and which gave rise to a considerable extent of argument, lately arose out of the following bequest by Lord Vere: He bequeathed certain chattels to trustees in trust for his wife for life, then to his son for life, "and after the decease of the survivor, in trust for such person as should from time to time be Lord Vere; it being my will and intention that the same should, after the decease of my wife, go and be held with the title of the family, as far as the rules of law and equity will permit." Lord Vere at his death left his wife and son surviving, and also two children of his son. The wife and son died, and afterwards the eldest grandson died, leaving issue a son, who died an infant, the second grandson being still living, and it

In the case of terms of years and personal chattels, the *vesting* of an interest which in reality would be an estate tail, bars the issue and all the subsequent limitations; but terms of years and personal chattels may be intailed by executory devise or by deed of trust, as effectually as estates of inheritance; if it is not attempted to render them unalienable beyond the duration of lives in being and twenty-one years after, and perhaps in the case of a *posthumous* child a few months more; a limitation of time wisely adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder as to postpone a complete bar of the intail by fine or recovery for a longer space. By a series of decisions every species of property is in substance equally capable of being settled in the way of intail, and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the intail is circumscribed almost as nearly within the same limits as the difference of property will allow².

Hence may be perceived, that notwithstanding the law has vested persons with great power for disposing of their real and personal estates by will, yet it has not left them to their own vain humour and caprice, in disposing thereof, but judiciously prescribed bounds whereby those estates may be rendered most beneficial to the succeeding generation; and upon those principles, and to prevent the extensive gifts in mortmain, corporations were excepted in the statute 34 & 35 Hen. VIII. as the gift to a corporation which never dies must tend to a perpetuity.

It having been held that the statute 23 Hen. VIII. did not extend to any thing but superstitious uses, and that

² Co. Lit. 20. note 5. 33d edit.

was held that the bequest amounted to a direct gift of the chattels, and that the son and eldest grandson took only for life, and that the deceased infant great-grandson took the absolute interest, which, consequently, vested in his personal representative. *Lord Deerhurst v. the Duke of St. Albans*, 5 Madd. 232.

therefore a man might give lands for the maintenance of a school, an hospital, or any other *charitable* uses; it was apprehended, that persons on their death-beds might make large and improvident dispositions even for those good purposes, and thereby defeat the political ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II. c. 36. that no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, *to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments* shall be given, limited, or appointed *by will*, to any person or persons, bodies politic or corporate, or otherwise, *for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable use whatsoever*; but such gifts shall be by deed indented, sealed, and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of such donor, and be inrolled in the high court of chancery within six calendar months after execution, and the same to take effect immediately after the execution for the charitable use intended, and be without any power of revocation, reservation, or trust for the benefit of the donor. And all gifts and appointments whatsoever *of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, or any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable use whatsoever, made in any other manner than is directed by this act, shall be absolutely null and void.* But the two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act; but with this proviso, that no college shall be at liberty to pur-

chase more advowsons than are equal in number to one moiety of the fellows, or students upon the respective foundations. —Where a devise was to the fellows and scholars of *Christ* and *Caius* colleges the same was held good, and within the abovementioned exception^a.

Upon the construction of this statute it has been determined, that if a man deviseth his land, that is, real estate (which the law terms land and agreeable thereto I have sometimes used the word land, instead of the words real estate, which imply one and the same thing), to trustees to be turned into money, and that money to be laid out in a charity, the devise is not good; for it is an interest arising out of land. So a devise of a mortgage or a term of years to a charity is not good. And if money be given to be laid out in lands, this is expressly within the act, but money given generally is not; which particulars will be enlarged on in our sixth and last chapter.

CHAPTER II.

OF MAKING THE WILL.

THE power persons have and may obtain for disposing of their estates and effects by will, having now been treated on, and likewise the bounds prescribed by the law, as limits to that power; whereby some of the requisites necessary to be observed in making the will may be perceived, we shall here proceed to treat on further requisites necessary to be attended to; and first take notice of persons who being under some special prohibition by law or custom, as for want of sufficient discretion, or for want of sufficient liberty and free-will, or on account of their criminal conduct are obliged to die intestate; and then consider the manner of making the will; whereby both real and personal estate is given or bequeathed,

^a *Attorney General v. Tancred*, Ambler's Rep. 351.

and where the will only concerns personal estate: who may be made executors, and whom the testator should beware of appointing; who may be devisees, and take by devise; and the manner of their taking real and personal estate by the will: the manner of bequeathing to married women and infants, and of appointing guardians: conditions not to trouble executors, and for preventing indiscreet marriages: the nature and effects of a gift in case of death; and of a nuncupative or verbal will.

As to persons restrained from making wills for want of sufficient discretion, some of those are infants, ideots, and persons of nonsane memory, who with married women are excepted out of the statute 34 & 35 Hen. VIII. c. 5. before mentioned^b; so that infants or persons under twenty-one years of age, who are styled infants, till then cannot by will dispose of their real estate; yet, as has been shewn, may thereby dispose of their personal estate at certain ages. And aliens, who were mentioned in the third section of the fourth chapter of the former part of this work, as not being capable of holding lands^c, consequently can never have any to dispose of; yet aliens may acquire a property in goods, money, and other personal estate, here in England, and dispose thereof by will, provided they are alien friends, or such whose countries are at peace with ours^d.

Amongst those persons disabled from making wills for want of sufficient discretion, as ideots and persons of nonsane memory, may be reckoned such persons as are grown childish by reason of old age or distemper, and such as have their senses besotted with drunkenness; all of whom are incapable, by reason of mental disability, to make any will so long as such disability lasts. To these also may be referred such persons as are born deaf, blind, and dumb; who having always wanted the common inlets of understanding, are incapable of having, as it is termed, *animus testandi*; and therefore any will made by them is void^e.

^b Page 160.

^c Page 123.

^d 1 Black. Com. 372.

^e 2 *Ibid.* 497.

An idiot, or natural fool, is he who, notwithstanding he be of lawful age, yet he is so witless that he cannot number to twenty, nor can tell what age he is of, nor knoweth who is his father or mother, nor is able to answer any such easy question; whereby it may plainly appear that he hath not reason to discern what is to his profit or damage, nor is apt to be informed or instructed by any other; and such an idiot cannot make any testament, nor dispose either of his lands or goods^f. An old man, who, by reason of his great age, is grown childish again, or so forgetful that he forgets his own name, cannot make a will; for a will made by such an one is void^g. A drunken man, when so excessively drunk as to be deprived of his reason and understanding, during that time may not make a will; for it is requisite, when the testator makes his will, that he should be of sound memory, and that he hath a competent memory and understanding to dispose of his estate with reason^h. A man of a mean understanding, neither of the wise or foolish sort, but indifferent, as it were, betwixt a wise man and a fool, and though he rather incline to the foolish sort, such an one is not prohibited to make a testament, unless he be yet more foolish, and so very simple, that he may be easily made to believe things incredible or impossible, and hath not as much wit as a child may have at ten or eleven years of age, who is therefore intestable by the law for want of judgmentⁱ.

Mad folks and lunatic persons, during the time of their furor or insanity of mind, cannot make a testament, nor dispose of any thing by will, because they do not know any thing they do; for in making a testament, the integrity or perfectness of the mind, and not health of the body, is requisite^k. And so strong is this impediment of insanity of mind, that if the testator makes his testament after his furor hath overtaken him, and whilst it doth possess his mind, although the furor doth after depart or cease, and the testator

^f Law of Test. 41. 4 Burn's Eccles. Law, 44.

^h Swinb. part 11. sect. 1.

ⁱ *Ibid.* sect. 4.

^g Swinb. part 11. sect. 1. 6 Co. Rep. 23.

^k Law of Test. 89. 4 Burn's Eccles. Law, 44.

doth recover his former understanding, yet the testament made during his former fit doth not recover any force or strength thereby^l. But if a man or lunatic person has a clear or calm mind, then during the time of such his quietness and freedom of mind he may make his testament ^m (1).

Every person is presumed to be of sound mind and memory unless the contrary be proved; and therefore, if any person goes about to overthrow a testament, by reason of insanity of mind or want of memory, he must prove the impedimentⁿ, which is a hard and difficult point: and therefore it is not sufficient for the witnesses to depose that the testator was mad or beside his wits, unless they render or yield a sufficient reason to prove this their deposition, as that they did see him do such things, or heard him speak such words, as a man having reason would not have done or spoken^o.

As persons who are born blind, deaf, and dumb, are incapable of making any will, so likewise are those who are deaf and dumb by nature; unless it appears by sufficient arguments that such a person understandeth what a will means, and that he hath a desire to make a will; for if he have such understanding and desire, then he may make his will by signs and tokens^p.

A blind person may make a nuncupative will, by declaring his mind before a sufficient number of witnesses; and he may make his will in writing provided it be read to him before witnesses, and in their presence acknowledged by him for his last will; but if a writing be delivered to a blind man, and he, not hearing the same read, acknowledges it for his will, this will not be sufficient; for it may be, if he had heard the same read, he would not have acknowledged it for

^l Law of Test. 39.

^o *Ibid.*

^m *Ibid.* 4 Burn's Eccles. Law, 44.

^p Law of Test. 44. 4 Burn's

ⁿ Law of Test. 40. 4 Burn's Eccles. Law, 54.
Eccles. Law, 44.

(1) *Acc. Cartwright v. Cartwright*, 1 Phillim. 90. *White v. Driver*, Ib. 84. 1 Dow's Rep. 178.

his will^a; therefore the best and safest way in such case is, that the will be read over to the testator, and approved by him in the presence of *all* the subscribing witnesses: yet the law of England does not seem precisely to require this strictness, if there be otherwise satisfactory proof of the will being read over to the blind man; as the single oath of the writer hath been allowed sufficient to prove the identity of the will^r (2).

The same precautions as are necessary for authenticating a blind man's will, seem in like degree requisite in the case of a person who cannot read; for though the law in other cases may presume that the person who executes a will knows and approves the contents of it, yet that presumption ceaseth where, by defect of education, he cannot read, or by sickness, is incapacitated to read the will at the time^s.

Persons for want of sufficient liberty and free will, being incapable of making wills as before-mentioned, are the next class here to be considered; and the first of these I shall take notice of is a married woman.

A married woman is utterly incapable of disposing of her real estate, either by will or deed, as has been shewn^t; and as to her chattels real and personal, the latter of those we have seen immediately vest in her husband on the marriage, and the former he may make his own if he chooses^u; wherefore she is incapable of disposing thereof, unless her husband should consent to her so doing, which is not likely he should, as it would be very inconsistent to give her a power of defeating the law in this respect, by enabling her to bequeath those chattels to another.

^a Law of Test. 45. ^r 4 Burn's Eccles. Law, 55.

^s Page 122.

^t 4 Burn's Eccles. Law, 55.

^u Page 3. 164.

(2) In the case of a blind man, stronger evidence than the mere attestation of signature will be required to support his will; but it is not necessary that the will should be read over to him in the presence of the attesting witnesses. *Longchamp d. Goodfellow v. Fish*, 2 New Rep. 415.

By the husband's consent the wife may make a testament, and as the husband before marriage frequently becomes bound in a bond or covenants with some of the woman's friends to give her such consent, he is bound by his bond or covenant so to do; but unless such consent be given to the particular will in question, it will not be complete even though the husband beforehand hath given her permission to make a will; yet it shall be sufficient to repel the husband his general right of administering his wife's effects (which otherwise he has a right to^w), and administration shall be granted to the wife's appointee^x, or the person appointed by the wife.

— A wife may make a will of chattels real and *choses in action* not reduced into possession; but if the husband does not assent to the proof of that will, it will be void, and cannot be proved. If he does consent, either by matter *ex post facto*^y, the death of the wife, or by previous contract, that consent entitles the executor to claim those things which would be the husband's as administrator. In the one case, the executor takes by legal inference, in the other by favour of the agreement made in consideration of the marriage. The executor of the wife, when she has a power to make a will, takes by her special appointment. With regard to chattels, both real and personal, the husband by contract anterior to the marriage, resting only in agreement, could authorize her to make a will: but in order to enable her to make a will of real estate, he must part with the legal estate to trustees; for by agreement, whilst resting in agreement, he cannot bind the heir, but can only bind himself, and the legal estate ought to be conveyed by legal conveyances^z (3).

^w See Page 3.

^x 2 Black. Com. 498.

^y *Ex post facto*, is a term used in the law, signifying something done after another thing that was committed before. And an act done, or estate granted, may be made

good by matter *ex post facto*, that was not so at first, by election, &c.

As sometimes a thing well done at first, may afterwards become ill. 8 Rep. 146. 5 Rep. 22.

^z *Hodson v. Lloyd*. 2 Bro. Cha. Rep. 543.

(3) In the case of *Scammel v. Wilkinson*, 2 East, 552, the court of king's bench determined, 1st, that a feme-covert

When a married woman dies, who by will or writing hath disposed of effects by power derived from a bond, settlement, or a will ; before such will or writing of the woman's is proved in the ecclesiastical court, the ordinary will require the husband's consent, either in person or by proxy, a person appointed by the husband for that purpose ; and if that cannot be obtained (as sometimes the husband will absolutely refuse such consent), then the ordinary will require the bond or settlement from which the wife derived her power, to be produced, and after abstracting it, will grant a probate or administration ; that is, if the wife hath appointed an executor, the ordinary will grant a probate ; if the wife hath not appointed an executor, but made only a kind of testamentary disposition in writing, then the ordinary will grant administration with such testamentary disposition annexed ; and in case the husband's consent hath not been obtained, but instead thereof the bond or settlement hath been produced, the contents thereof issues with the probate or administration from the ordinary ; and this will be attended with expence according to the length of the bond or settlement, which, if very long, the extraordinary expence will be considerable, wherefore it is best to obtain the husband's consent if it can be had.— If the wife disposes by power derived from a will which hath been proved, and the husband withholds his consent, the extraordinary expence of obtaining the probate or administration will be

could have no power of disposition, but what might be acquired by the husband's assent over that which was his property *proprio jure* : 2dly, that over property which she had *in autre droit*, she had a power without her husband's assent to transmit by will what was not reduced into possession, which would pass to the devisee by right of representation to the former owner ; but not over that which was reduced into possession, which must pass as that which was the husband's *proprio jure* : and 3dly, that her husband could not, by any assent, enable her by any will made during the coverture to dispose of property which she might acquire after his death.

very trivial, to what it will be when the power is derived from a settlement of any considerable length.

By this it may be perceived how marriage alters the power that a woman before the consummation thereof had over her estate and effects; and in respect to a will, if she should have made any before marriage, the same can be of no effect after her marriage, that being a revocation in law, and entirely vacates the will^a. If she make any will during marriage, and die in her husband's lifetime, we have seen that it will be effectual with having her husband's consent, or if made pursuant to power she had for that purpose. — Where a woman by settlement previous to her marriage conveys an estate to trustees, in trust to convey to such uses as she, whether sole or covert, should by deed or will appoint, and during her coverture makes her will and bequeaths the estate, and after the death of her husband takes a conveyance of the estate from the trustees to her own use, the conveyance is a revocation of the will; as where *Hester Spencer*, previous to her marriage with the late Mr. *Dingley*, by indentures of 17th and 18th June, 1760, conveyed an estate to trustees, in trust to convey the same to such uses as she, whether sole or covert, should by deed or will appoint. In 1765, being then covert, she made a will, reciting the power, and made conformable to it, by which she gave the estate in question, in case she should have no children, to her niece, *Dorothy Askew*, for life, with remainders, under which the plaintiff claimed the reversionary interest, subject to *Dorothy Askew's* life-estate. After the death of her husband, Mrs. *Dingley*, by a conveyance for that purpose, reciting the power, and made conformable to it, directed the trustees to convey, and they conveyed the estate to her in fee. The question was whether this conveyance was a revocation of the will. — Lord Chancellor said, there is no doubt about it, the question is, which of the acts is an execution of the power; there is no doubt it is executed by the conveyance to her own use^b.

^a 4 Co. Rep. 60. 2 Bro. Cha. Rep. 541. 544.

^b *Lawrence v. Wallis*, 2 Bro. Cha. Rep. 319.

If a married woman has any pin-money or separate maintenance, it is said she may dispose of her savings thereof by any writing in nature of a will without the control of the husband^c, and if she survives him, shall have it herself, and the same shall not be liable to her husband's debts^d (4).

Where the wife hath goods in the right of another person as executrix or administratrix, and not as legatee, of these she may by will appoint an executor, and such will of the wife does not require the husband's consent: for in default of her appointing an executor, the testator's next of kin will be entitled to the administration, as was mentioned in the former part of this work.

That sufficient liberty and free will is necessary to the making a will, it may be observed, that if the same is made by a person through fear in consequence of threatening, and which being such fear as may move a constant man, as the fear of death, or bodily hurt, or of imprisonment, or the loss of all or most part of his goods, or the like; it will be set aside: yet as to this no certain rule can be delivered, but

^c 2 Black. Com. 499.

^e Page 4.

^d 4 Burn's Eccles. Law, 49.

(4) Where personal property is given in trust for the sole and separate use of a married woman, she may dispose of it by will without her husband's assent. *Tappenden v. Walsh*, 1 Phillim. 352. And it may now be considered as settled, that wherever property has been given to the separate use of a married woman whether accompanied by a power of appointment or not, she may exercise her right of ownership over it without the consent of her trustees, and even in opposition to them. She may dispose of it by will, or by grant of annuity out of it, or she may sell her reversionary interest in it. *Sperling v. Rochfort*, 8 Ves. 164. *Rich v. Cockell*, 9 Ves. 369. *Wagstaff v. Smith*, lb. 520. *Parkes v. White*, 11 Ves. 209. *Witts v. Dawkins*, 12 Ves. 501. *Sturgis v. Corp*, 13 Ves. 190. *Brown v. Like*, 14 Ves. 302. *Essex v. Atkyns*, lb. 542.

it is left to the discretion of the judge, who will not only consider the quality of the threatening, but also the person as well threatening as threatened; in the person threatening his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like. But if the testator afterwards, when there is no cause of fear, do ratify and confirm his will, the same is then good in law ^f.

Fraud or deception relating to a will of personal estate is examinable only in the spiritual or ecclesiastical court; but in respect of a real estate, it was decreed in the house of lords that a will thereof could not be set aside in a court of equity for fraud or imposition; but must be tried at law, being a matter proper for a jury to enquire into ^g.

Persons incapable of making wills on account of their criminal conduct are the next class here to be considered; and the first of those we shall take notice of are traitors.

A traitor, or one who has judgment awarded against him for high treason, forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his right of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the crown; and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist ^h; and a traitor, when convicted, is deprived of making any testament or other kind of last will, and if he has made any before, the same by the conviction becomes void in respect of his goods and chattels ⁱ; so in respect of real estate after judgment is awarded pursuant to conviction.

For petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life; and after his death all his lands and tenements in fee-simple (but not those in fee-tail) to the

^f Law of Test. 51. 4 Burn's Eccles. Law, 53.

^h 4 Black. Com. 381.

ⁱ 4 Burn's Eccles. Law, 55.

^g *Ibid.* 52. 4 Burn's Eccles. Law, 54.

crown, and the king shall have them for a year and a day, and then the lord of the fee shall have them by way of escheat^k; therefore, when a person is found guilty either of petit treason or felony, and judgment of death is awarded on which his lands or real estates are forfeited, and his goods and chattels on conviction previous to the judgment, he can make no disposition of either by will or deed; because the law hath then disposed thereof; yet a pardon will restore him to his former estate^l, as it doth a person attainted of high treason before mentioned.

There is a difference between conviction and judgment; conviction is when the offender is found guilty by a jury, on which, or soon after, judgment is awarded against him by the judge, and then he is said by the law to be attainted; but before judgment is awarded the offender is asked if he has any thing to offer why it should not be awarded against him, which he sometimes has, as exceptions to the indictment, and thereby the proceedings against him may happen to be set aside. In many cases where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given; therefore in those cases the forfeiture must be upon conviction or not at all^m.

Likewise there is this difference between the forfeiture of lands or real estate, and the forfeiture of goods and chattels. The *former* has relation back to the time of the fact committed, so as to avoid all intermediate charges; the *latter* has no relation backward; so that those only which a man hath at the time of conviction shall be forfeited; therefore a traitor or felon may *bona fide* sell any of his chattels, real or personal, between the fact and conviction; yet if they be collusively, and not *bona fide* parted with, merely to defraud the crown, the law, (and particularly the statute 13 Eliz. c. 5.) will reach themⁿ.

Obstinately standing mute on arraignment, where a person is indicted for felony, or other crimes, amounts to a

^k 4 Black. Com. 385, 386.

^l 4 Burn's Eccles. Law, 56.

^m 4 Black. Com. 375, 387.

ⁿ *Ibid.* 388.

confession, and will have the same effect as if the prisoner had been convicted by verdict or confession of his crime ^o.

As the forfeiture of lands or real estates arises only upon attainder, that is, upon the judge's awarding judgment of death or outlawry, a *felo de se*, or person who wilfully kills himself, forfeits no lands of inheritance or freehold, because he never is attainted as a felon ^p; and therefore if he has made any will of his lands, the same may pass thereby to the devisees; yet as to his goods and chattels, and the appointment of an executor, his will (if he hath made any) shall be void ^q.

Gavelkind lands, although the ancestor be hanged, are never forfeited for felony, as hath been mentioned in the former part of this work ^r.

An outlawed person is out of the king's protection and out of the aid of the law, and although the outlawry be only for debt, his goods and chattels are forfeited so long as the outlawry subsists ^s; and if the action on which he was outlawed were not just, yet his goods and chattels are forfeited, because of his contempt in not appearing; and therefore he cannot make his testament of his goods so forfeited. But a man outlawed for debt, or in a personal action, may in some cases make executors; for he may have debts upon contract which are not forfeited to the king; and those executors may have a writ of error to reverse the outlawry ^t.

Papists, till of late years, were under divers disabilities in respect to taking lands either by purchase or descent ^u; but now, by their complying with the statute 18 Geo. III. c. 60. and taking the oath therein prescribed, those disabilities are removed; and by statute 31 Geo. III. c. 32. various other disabilities to which persons professing the popish religion were subject, are likewise removed by their

^o 4 Black Com. 329.

^p *Ibid.* 386.

^q 4 Burn's Eccles. Law, 56.

^r Page 127.

^s 2 Black. Com. 499.

^t Law of Test. 47. 4 Burn's Eccles. Law, 56.

^u 2 Black. Com. 257. 293.

complying with the statute, and taking the oath herein prescribed.—With respect to aliens, it hath already been shewn that those are incapable of holding any real estate.

Thus having taken notice of the persons restrained from making wills, as being under some special prohibition by law or custom; we come now to consider the manner of making the will, whereby both real or personal estate is given or bequeathed, and where the will only concerns personal estate. Who may be made executors, and of whom the testator should beware of appointing. Who may be devisees and take by devise, and the manner of their taking real and personal estate by the will. And here we shall first attend to the rules for the construction of wills, and the manner estates in fee-simple, fee-tail, or for term of life only, may be created, likewise the date of the will, and what is requisite, with respect to the testator's signing thereof, and witnesses subscribing their names thereto.

It is a rule in the construction of wills, that the same be most favourably expounded, to pursue if possible the will of the testator, who for want of advice or learning may have omitted the legal and proper phrases. And therefore many times the law dispenses with the want of words in devises, which are absolutely requisite in all other instruments; and hereby a fee may be conveyed without the words of inheritance, and an estate-tail without words of procreation^x, as we shall see hereafter. But notwithstanding the mind of the testator, if possible, should be pursued, yet it must be so as his intent might stand with the rules of the law and not be repugnant thereto, it being a rule that the last will of a testator is to be fulfilled according to his true intention, but the spirit of the law is to be preserved^y; therefore when the testator endeavours to make a settlement of his estate contrary to the reason and policy of the law, the judges will reject it^z; and herewith agrees what has been mentioned concerning the disposal of estates in such manner as the

^x 2 Black. Com. 381.

^z Gilb. on Wills, 112.

^y Shep. Touch. 416.

same may not thereby be rendered unalienable after a certain time.

All the words of a will must be considered together, to find out the intention, and the intention must take place, unless contrary to the rules of law^a. The intention of the testator expressed in his will, "*if consistent with the rules of law,*" shall prevail. But those words, "*if consistent,*" &c. are applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words. A man cannot by will create a perpetuity; he cannot put the freehold in abeyance; he cannot limit a fee upon a fee; nor make a chattel descendible to heirs; nor prevent a tenant in tail from suffering a recovery. But the question, whether the intention be consistent with the rules of law or not, can never arise, till it is settled what the intention was. This can only be discovered by taking the whole will together. If it be apparent, (says Mr. Justice Buller,) I know of no case that says, a strict legal construction, or a technical sense of any words whatsoever, shall prevail against it; unless the case of *Perrin v. Blake* be considered as such, which I do not consider as such, nor think myself bound by it^b. — The learned judge referring hereto in a later case, says, it is laid down as clear, that if a testator uses technical terms they should carry the interest according to known rules; but this seems to be laid down too broad. I laid down the rule somewhat differently, that where the testator uses only technical phrases, the court is bound to understand them as such, because the court cannot say that he did not know their meaning; but if the testator uses other expressions in other parts of his will, which shew he did not mean to use those phrases technically, then the intention must prevail^c.

^a Amb. Rep. 345.

^b *Hodgson v. Ambrose*, Doug. Rep. 341. 2d edit.

^c *Philips v. Garth*, 3 Bro. Cha. Rep. 68. In this case it was held,

that a gift of residue, to be divided amongst next of kin, share and share alike, shall be divided among surviving brothers, nephews, and nieces, (representing deceased bro-

The testator's intention is to be collected from the words which he has used in his will, and not from conjecture ; and though it is not necessary that any technical or artificial form of words should be used in a will, yet the testator's meaning must be collected from the words he has used, and wheretof words which he has not used cannot be added^d. And this intention must be collected from the will itself, and not from any *parol* evidence concerning it^e.

thers and sisters) *per capita* not *per stirpes* (5). This case was held to be like that of *Green v. Howard*, 1 Bro. Cha. Rep. 31. and that a gift to *relations* meant the same as to *next of kin*. In a latter case, a gift of a residue to be divided among persons related to the testator, was held to be confined to relations within the statute of distributions. *Rayner v. Mawbray*, 3 Bro. Cha. Rep. 234.

^d Durnf. & East Rep. 86.

^e Upon the construction of a will, courts of law and equity are very cautious in admitting *parol* evidence. It has been admitted to ascertain the person where there are two of the same name, or where there has been a mistake in the christian or surname. 2 Atk. 372. Likewise in favour of executors, where the next of kin claimed the undivided surplus ; and the ground

(5) The decision of Mr. Justice *Buller* in this case afterwards came under the consideration of Lord *Thurlow*, who doubted it upon this technical reasoning ; that next of kin, being the only description, without the addition (which is in the statute) of those who represent them, the children of the deceased brothers and sisters ought not to have taken under that bequest. And Lord *Eldon*, in *Garrick v. Lord Camden*, 14 Ves. 372. 385., referring to Lord *Thurlow*'s doubt, states his own opinion as agreeing with Lord *Thurlow*'s upon that decision. Accordingly, in *Smith v. Campbell*, Coop. 275. S. C. 19 Ves. 408., Sir *William Grant* determined, that under a bequest to *nearest surviving relations*, surviving brothers and sisters were entitled, to the exclusion of nephews and nieces of a deceased brother ; and that learned judge intimated that his opinion would have been the same had the bequest been to the *next of kin* of the testator. And in an anonymous case, 1 Mad. 36., Sir *Thomas Plumer* held, that under a limitation by settlement of personal property " to next of kin of equal degree," the property passed to a surviving sister in exclusion of children by a deceased brother. See also *Stamp v. Cooke*, 1 Cox, 234. *Pepe v. Whitcombe*, 3 Meriv. 689.

Where residue of three *per cent.* annuities, was given "in trust to pay the same unto and between the *two daughters* of *T. S.* in equal shares and proportions, during their lives, and, if *either* of them should die, then to pay the whole to the survivor during life; and, in case *both* should depart this life, then the whole was to fall into the residue, and testatrix appointed *W.* and *R.* residuary legatees." — *T. S.* had three daughters, and it was held they shall all take equal shares. — In this case, for the three daughters the plaintiffs, it was argued, that this will can admit but of two constructions, either the two eldest daughters of *T. S.* must take, or the word *two* must be rejected, and all the daughters must take. — *Sleech v. Thorington*, 2 Ves. 260. is a bequest to the *two* servants who should live with the testatrix at the time of her decease; at the testatrix's death, she had three servants, and they were all decreed to take equal shares. In that case, *Tomkins v. Tomkins*, in 1745, was cited, where the testator gave to the three children of his sister 50*l.* each; the sister had four children, and they were all let in. In *Scott v. Fenhoulet*, in 1799 (as to this point not reported), there was a legacy given to captain Compton and each of his *two* daughters, if each or *either* of them should survive lady Chadwick. Captain Compton had more than two daughters, and it was held, that all the daughters should take.

Master of the rolls. — In construing wills, courts ought

of its admissibility as to executors is, that it is adduced to rebut a presumption raised against the legal title of the executor. 2 P. Will. 159. note 1. 4th edit. In the case of *Fonnereau & Poyntz*, the admission of parol evidence being contended for, it was observed that the court would not admit it to raise a title or gift; but where the title or gift is raised, and there is a doubt as to the person or other circumstances, then parol evidence shall be admitted. And here Lord Thurlow observing in his discussion, that every evidence, as to

the description of the subject the testatrix described, must be admitted, his lordship's opinion was, that he could let in evidence of the value of the estate, not to control the bequests which the testatrix had made in words themselves distinct, nor to control a bequest which she had made of a subject she had accurately described; but because the words which she had used in the description were, upon the whole of the context, uncertain. 1 Bro. Cha. Rep. 472.

not to indulge conjecture; it were much better that many wills should be defeated. In this case, I am not prepared to control the cases which have been determined. When rules are laid down, they ought to be such as meet the common sense of mankind. I acknowledge, on the present subject, I yield to the authority of the cases, and not to the reason of them; but on the authority of the cases, I must declare that all the daughters shall take^f (6).

Favour is shewn with respect to wills in what the law calls executory devises, which is the limitation of a future interest, not to take place immediately on the death of the testator, but at a time and under circumstances appointed by the will; as when a man devises a future estate to arise upon a contingency, and till that contingency happens does not dispose of the fee-simple, but leaves it to descend to his heir at law; as if one devises land to a feme sole or unmarried woman and her heirs upon her day of marriage; here is in effect a contingent remainder without any particular estate to support it; a freehold commencing *in futuro*, or at a future time. This limitation, though void in a deed, yet is good in a will by way of executory devise^g. On the subject of executory devises much might be said; but as it is a doctrine that cannot be understood but by such as are well versed in the law, unless fully explained, I shall here briefly observe, that an executory devise seldom happens, when the will is made with good advice and due consideration; and proceed to shew, that, in respect to real estate, if the testator makes no other disposition thereof than

^f *Stebbing v. Walkey*, 2 Bro. 2 Black. Com. 172.
^g *Cha. Rep.* 85.

(6) In a modern case, *Garvey v. Hibbert*, 19 Ves. 125. Sir William Grant determined that under a bequest to the three children of A. of 600*l.* each, four children born before the date of the will, were each entitled to the same sum. See also *Scott v. Fenhoulet*, 1 Cox, 79. *Humphreys v. Humphreys*, 2 Cox, 184.

the law would have done had he been silent, the devise will be rejected; as if I give land to my son and his heirs, or to John Syms and his heirs, and my son or John Syms is my heir at law, this devise will be void, and my heir shall take the land by descent, as his better title; for the descent strengthens his title, by taking away the entry of such as may possibly have right to the estate^h; whereas, if he claims by devise, he is in by purchase, as heretofore shewnⁱ. So, if I devise land to my wife for her life, and after her death the same lands in fee-simple to my son, who is my heir at law, or if I devise it to my executors for a term of years, and after the expiration thereof to my son in fee-simple; in neither of these cases shall he take the land by the will; because, if no such devise had been made, he would have had the land after the death of my wife^k, or after the expiration of the term of years. But, if I create another estate by my will than would have descended to my heir at law, or where the quality of my estate is altered by the devise, there the disposition of the will shall prevail though it be made to the heir at law; as where a man may have a son and a daughter, and deviseth that his land shall descend to his son, and if he die without issue of his body, that then the same shall go over to the daughter: the son by this devise takes an estate tail, though heir at law to the devisor; because here is an estate tail created by the will, and the heir must take under the will, or the remainder to the daughter would be void. So where a man may have three daughters, his only issue, and deviseth his land to them and their heirs, this devise, though to the heirs at law, is good; because it makes them joint-tenants, in which survivorship takes place, as we have lately seen^l; whereas, had the daughters taken by descent they had been coparceners^m; and the will altering the quality of the estate ought to prevailⁿ.

^h Gilb. on Wills, 112. Law of Test. 153.

ⁱ Page 164.

^m Mentioned page 112.

^l Page 87. 113.

ⁿ Gilb. on Wills, 114. Law of

^k Gilb. on Wills, 113. Law of Test. 154.

Those devises are also void and rejected where the words of the will are so general and uncertain that the testator's meaning cannot be collected from them; therefore, where a man by his will devised by these words, *I give all to my mother*, it was held that the lands did not pass; for the words were too uncertain, and not sufficient to disinherit an heir^o; it being a rule that the heir at law has a plain and uncontroverted title unless the ancestor disinherits him, and it would be unreasonable to set him aside, unless the intent of the ancestor is evident from the will (7).

The title of the heir at law is not to be defeated but by some other title certain and unexceptionable. And therefore where there is proof of the existence of a will, the contents of which do not appear, no conjecture shall be admitted as to the contents of such will, in prejudice of the heir. So, two inconsistent wills of the same date, neither of which can be proved to be the last executed, (unless explained by some subsequent act of the testator,) are void for uncertainty, and will let in the heir. On the other hand, wherever an *effective* devise appears to have been once made in disinherison of the heir at law, it shall lie upon the heir to prove that such devise has been *effectively* defeated.

The words in a will whereby persons may take an estate in fee-simple, fee-tail, or for term of life only, are various; as in the construction of wills, which are to be so favourably expounded as to pursue if possible the will of the testator, as has lately been mentioned, the law many times dispenses with the want of words in devises that are absolutely requisite in all other instruments; wherefore a fee may be conveyed without words of inheritance, and an estate tail with-

^o Gilb. on Wills, 115.

^p 1 P. Will. 345. n. 4th edit.

(7) In *Mohun v. Mohun*, 1 Swanst. 201., a testamentary paper, in the following form, "I leave and bequeath to all my grandchildren, and share and share alike;" and, "further, I appoint *T. H.* and *T. E.* my trustees for all my grandchildren and nieces," was held void for uncertainty, and to pass no interest in the real estate.

out words of procreation. The usual words for conveying a fee-simple, either by deed or will, are, *heirs and assigns for ever*; but by a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee hath an estate of inheritance, although the devisor hath omitted the legal words of inheritance¹ (8). And a devise of all the rest, residue, and remainder of the devisor's lands, *hereditaments*, goods, chattels, and personal estate, "his legacies and funeral expences being *thereout* paid," was held to convey the fee of all the devisor's real estate; as that by the words of this devise all the legatees may call on the devisee for their demands; and therefore it must be taken to have been the devisor's intention to give the devisee wherewithal to pay them. And it was said, that such is the rule of law, that unless some words are used which the law considers sufficient to carry a fee, the devisee can only take an estate for life; though indeed slight expressions are sufficient to pass the inheritance, where the court thinks that such is the devisor's intention. No technical words are necessary in a will to give a fee; but if any words are inserted, to effectuate which it is necessary that a fee should pass, that is sufficient. On the words of this will there can be no doubt: the testator first bequeathed a leasehold estate to his sister for *the residue of the term*, and afterwards devised "all the rest, residue, and remainder of his lands, *hereditaments*, and personal estate," to the same person; he clearly therefore intended to give by this devise, every thing which he had not before disposed of. Then follow the words, "my legacies and funeral expences being *thereout* paid," which of themselves are sufficient to pass the fee² (9).

¹ 2 Black. Com. 108. 381.

² *Doe v. Richards*, 3 Durnf. & East, Rep. 356.

(8) See the second volume of Mr. Preston's Treatise on Estates, p. 68. *et seq.*, where all the cases on this subject are collected and are digested with that gentleman's usual perspicuity and learning.

(9) Although no estate be limited by express words, yet to charge the land with a trust which cannot be performed,

An estate tail, the usual words for creating it, either by deed or will, are, *the heirs of the body* of the grantee, or devisee: as suppose it to be created by will, I give and devise to J. S. (or whoever he may be) *and the heirs* of his body; but in a will an estate-tail may be created by a devise to a man and his children^a; or to a man and his seed, though the word of procreation, *viz. body*, be omitted^t. And under a devise to "A for life, and after his decease *to and amongst his issue, and in default of issue,*" then over to others named in the will, A takes an estate tail^u.

In a will, "*issue*" is either a word of purchase or limitation, as will best effectuate the devisors intention. Therefore where A devised his estate to his two daughters, equally to be divided between them, *viz. one moiety to one and her heirs, and the other moiety to the other for life, and after her decease to the issue of her body and their heirs for ever*; and she had one child living at the time of the devise, the second took only an estate for life, with remainder to her children as purchasers^w.

An estate for life may be; as where the estate was limited by will to A for life, remainder to his first and other sons in tail male, "*remainder to the use of all and every the daughters, &c. as tenants in common; and in default of such issue, to the use of the right heirs of the devisor.*" After the death of A without any son, an only daughter was held to take only an estate for life^x. And where a devise was of

^a Gilbert on Wills, 33.

^t 1 Black. Com. 180. 2 *Ib.* 115.

^u *Doe v. Applin*, 4 Durnf. & East, Rep. 82.

^w *Roe dem. Cooper v. Collis*. 4

Durnf. & East, Rep. 294.

^x *Hay v. The Earl of Coventry*, 3 Durnf. & East, Rep. 83.

or to direct an act to be done which cannot be accomplished or to impose a charge which cannot, in *point of estate*, be sustained, by means of the interest of the devisee in the land, unless more than an estate for his life pass to him, is, in wills, in which the intention governs the construction, and in the absence of words of express limitation, equal to a declaration, that the person designated to execute the trust, or, perform the act, or bear the charge, should have the fee. See 2 Preston on Estates, 207. *et seq.*

real and personal estate, to the wife for life, remainder to the testator's son R. R. *and his issue* lawfully begotten, to be divided as he shall think fit; and if he should die without issue, remainder over, it was held that R. R. took only an estate for life. — That he had a power to divide; but if he did not so, there was an interest in his children that would entitle them to an equal division^y (10).

If the devise be to a man and his assigns, without annexing the words of perpetuity, there the devisee shall take only an estate for life^z. — By a will, an estate may pass by mere implication, without any express words to direct its course. As, where A devised lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication; for the intent of the testator is clearly to postpone the heir till after her death; and if she does not take it, nobody else can. So also, where a devise is of black-acre to A and of white-acre to B, in tail, and if they both die without issue, then to C in fee: here A and B have *cross remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail. But, to avoid confusion, no such cross remainders are allowed between more than two devisees: and in general where any implications are allowed, they must be such as

^y *Hockley v. Mawbey*. 3 Bro. Cha. ^z 2 Black. Com. 108.
Rep. 82.

(10) In *Doe d. Wright v. Jesson*, 5 Mau. & Selw. 95., a devise to W., one of the sons of my sister, A. W., before marriage, for his natural life, and from and after his decease to the heirs of the body of W. lawfully issuing in such shares as W., by deed or will, should appoint; or, for want of such appointment, to the heirs of the body of W. lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such child, and for want of such issue, to my right heirs for ever, was held to convey to W. and his children who were born after the death of the testator, only estates for life.

are necessary (or at least *probable*) and not merely *possible* implications^a.

Where it is intended a man should have only an estate for life, the usual method, both in deeds and wills, is, to convey the estate by the words, *during the term of his natural life*; and then for preserving contingent remainders, to convey or devise the same to trustees. With respect to devises, though an express estate for life be given to the ancestor, with a limitation to the heir or heirs of his body, or his issue, yet regularly the ancestor takes an estate tail^b; and if a devise be to one for life, and afterwards a limitation, either immediate or mediate, to the heirs of his body, the devisee takes an estate tail^c, whereby a father may secure the estate to himself, and deprive his children thereof.

As to the date of the will, no testament being of any effect till after the death of a testator, therefore if there be many testaments the last overthrows all the former, as we shall again see under a subsequent head; but the republication of a former revokes one of a later date, and establishes the first again. And if there be two clauses in a will so totally repugnant to each other that they cannot stand together, the latter shall be received and the former rejected; wherein it differs from a deed; for there of two such repugnant clauses the former shall stand. Which is owing to the different natures of the two instruments; for the last will and first deed is always most available in law. Yet in both cases we should rather attempt to reconcile the repugnant clauses^d.

For reconciling repugnant clauses in wills, and where by the same will the same thing has been given to two different persons, there hath been much litigation, and various have been the determinations of the courts concerning it; yet the

^a 2 Black. Com. 381.

^b 1 Co. Rep. 99.

^c Burr. Mansf. 1631. If land be given to a man for life, and then to trustees to preserve contingent remainders, and then to the heirs male of the devisee, he will have an estate tail in remainder, according to *Dun-*

combe v. Duncombe, [3 Lev. 437.] and *Coulson v. Coulson*, [2 Atk. 246.] Ambl. Rep. 345. And here-with corresponds the doctrine in the case of *Hodgson v. Ambrose*, here-after cited.

^d 2 Black. Com.. 381. 502.

rules of law for construction of wills, of which mention hath heretofore been made, and of which further mention will occasionally be made hereafter in different parts of our work, have always been adhered to, and, if possible, the will of the testator pursued. And in a late case, where two legacies were given to one person by the same will; as where two, each of 1000*l.* Old South Sea Annuities, were given *simpliciter*, plainly or simply to the same person by the same instrument, it was presumed the testator intended the legatee should have but one, and decreed accordingly ^e. Yet where a legacy of 500*l.* was given by the will, and another of 500*l.* by a codicil added thereto, it being inferred the testator intended the legatee to have both, it was so determined. And by the lord chancellor in delivering his opinion hereon: After reading the very able opinion of Mr. Justice Aston, in the case of *Hooley and Hatton*, which was examined with abundant care, and contains the whole doctrine of the law upon the subject. The rule there laid down seems to be this, that where a testator gives a legacy by a codicil as well as by a will, whether it be *more, less, or equal*, to the same person who is a *legatee* in the will, speaking *simpliciter*, it is an *accumulation*: On the other hand, the rule of *exclusion* has gone upon very slight grounds, according to former authorities. The common case where the legacies have not been held to be accumulative, is where the same *corpus* [body] (according to the Digest) is given *twice* to the same person, the second legacy *nil operatur*, [operates nothing], because it cannot be given more than once. Where the same quantity has been given, and the same cause, or no additional reason assigned for a repetition of the gift, the court has inferred the testator's intention to be the same, and rejected the *accumulation*: but where the same quantity is given, with any additional cause assigned for it, or any implication to shew that the testator meant that the same thing, *prima facie*, should accumulate, the court had decided in favour of the *accumulation*. In the present case, it happens that an *additional cause* or mark of *favour* has been mentioned in the codicil, which proves

^e *Garth v. Meyrick*, 1 Bro. Cha. Rep. 30.

that the testator meant and intended an *accumulative legacy* ^f.

This doctrine has been relied upon, and similar decisions made in other cases since determined ^g. And the principles of it were admitted in a case where a second codicil appeared to be only a repetition of a former, (with the addition of a simple legacy); and here the legacies were held not to be doubled. — Parol evidence was read, to shew they were intended as accumulative. — Lord Chancellor said, I have hitherto understood the result of the cases to be, that *prima facie* both instruments speak for themselves, but that the probable inference that the testator meant two legacies may be repelled by circumstances. — There is a great variety of opinions in the books. Even in the case of only one instrument, it has been held that slight circumstances, as a cause given for the second gift, will make it accumulative. — I refer entirely to the argument of Mr. Justice Aston, in *Hookey v. Hatton*, [above-mentioned,] taking, from it, that when the same legacy has been given in a will and a codicil, the court generally takes it as one legacy, but that the court has not considered the presumption as very strong, but slight circumstances have been held to controul it, where it is evident the testator meant to repeat the legacies they are not duplicated. I think here the testator meant to leave but one codicil. The last codicil therefore alone ought to stand ^h (11).

^f *Ridges v. Morrison*, 1 Bro. Cha. Rep. 389.

^h *Cooté v. Boyd*, 2 Bro. Cha. Rep. 521.

^g *Reay v. Hopper*, and *Jackson v. Jackson*, 1 Bro. Cha. Rep. 398. n.

(11) The true result of the decisions, as they apply to the present subject, may be stated thus : Where a testator leaves two testamentary instruments, and in both has given a legacy *simpliciter* to the same person, the court, considering that he who has given twice, must *primâ facie* be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less, or larger than the first. But if in such two instruments the legacies are not given *simpliciter*, but the

In making a will where any real estate is intended to pass thereby, due attention must be had to the statute 29 Car. II. c. 3. (commonly called the statute of frauds), which directs that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence and by his express direction; and be subscribed in his presence by three or four credible witnesses. In the construction of this statute it has been adjudged that the testator's name written with his own hand, at the beginning of his will, as, "I John Mills do make this my last will and testament," is a sufficient signing, without any name at the bottom; though the other is the safer way. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times. But they must all subscribe their names as witnesses *in his presence*, lest by any

motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift. The court, however, raises this presumption only where the double coincidence occurs of the same motive and the same sum in both instruments. It will not raise it, if in either instrument there be no motive, or a different motive expressed, although the sums be the same; nor will it raise it, if the same motive be expressed in both instruments, and the sums be different. *Foy v. Foy*, 1 Cox, 163. *Baillie v. Butterfield*, Ib. 392. *Campbell v. Earl of Radnor*, 1 Bro. C. C. 271. *James v. Semmens*, 2 H. Bl. 213. *Allen v. Callow*, 3 Ves. 289. *Barclay v. Wainwright*, Ib. 462. *Osborne v. Duke of Leeds*, 5 Ves. 369. *Benyon v. Benyon*, 17 Ves. 34. *Currie v. Pye*, Ib. 465. *Hurst v. Beach*, 5 Madd. 351. But this reasoning has no application to cases where the second instrument affords intrinsic evidence that it was intended by the testator in substitution of the first instrument. *Duke of St. Albans v. Beauclerk*, 2 Atk. 636. *Cooté v. Boyd*, 2 Bro. C. C. 521. *Attorney General v. Har-ley*, 4 Madd. 263.

possibility they should mistake the instrument¹. It has likewise been determined, that a will is good though none of the witnesses saw the testator *actually sign it*, if he owns it before them to be his hand-writing; and it is observable that the statute of frauds does not say the testator shall sign his will in the presence of three witnesses, but requires these three things; first, that the will should be in writing; secondly, that it should be signed by the testator; and thirdly, that it should be subscribed by three witnesses, in the presence of the testator² (12). But it is not necessary that the witnesses should be acquainted with the contents of the will³. And, although the statute requires that the witnesses to the will shall subscribe their names in the testator's presence (to prevent obtruding another will in the place of the true one,) yet it is sufficient if the testator *might* see, it not being absolutely requisite that he *should* actually see them signing; for, at that rate, if a man should but turn his back, or look off, it might make the will void. And where the testator desired the witnesses to go into another room seven yards distant to attest his will, in which there was a window broken through, whereby he might see them, it was adjudged by the court to be a witnessing in his presence⁴. So, where a will was attested by witnesses in an attorney's office, when the testatrix was in her carriage, where she might see them through the windows thereof and of the attorney's office, it was adjudged to be well attested⁵ (13).

¹ 2 Black. Com. 377.

509. 4 Burn's Eccles. Law. 173.

² *Stonehouse and Evelyn*, 3 P.

³ 2 Salk. 688.

Will. 254.

⁴ *Casson and Dade*, 1 Brown's

⁵ *Ellis and Smith*, 5 Bac. Abr. Cha. Rep. 99.

(12) See *Westbeach v. Kennedy*, 1 Ves. & Bea. 362. S. P.

(13) But the testator must be in a situation that he may see the witnesses attest; therefore where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room a person by inclining himself forward, with his head out at the door, might have seen the witnesses, but that the testator

The witnesses should be entirely disinterested persons, and such as can receive no benefit or advantage by the will, and if there is any freehold estate devised thereby, there must, as has been shewn, be three of them; but if the will concerns only personal estate, two witnesses will be sufficient, concerning which somewhat more will presently be mentioned. A witness either to the execution of a will or codicil should have no legacy given him thereby, neither should he be a creditor of the testator, especially where, as is often the case, the land devised by the will is made subject to the payment of debts. For by the statute 25 Geo. II. c. 6. all legacies given to witnesses are declared void. And in a case before the court of King's Bench, in Mich. Term. 31 Geo. II. where all the subscribing witnesses were creditors of the testator, at the time of executing his will, it was urged that their being creditors of the testator invalidated their testimony, and that notwithstanding their debts were paid them before the time of trial. Yet the court in this case determined that a benefit given to a subscribing witness should not annul his attestation, if, at or after the testator's death, the witness be disinherited^o. However, it is safest to have persons for witnesses who are quite disinterested; as here we see legatees by being witnesses lose their legacies; and as to creditors, though their testimony will be admitted on a trial, yet their credit will be then left (like that of all other witnesses) to be considered on a view of all circumstances by the court and jury (14).

° Burr. Rep. 430.

was not in such a situation in the room that he might by so inclining have seen them, it was held that the will was not duly attested. *Doe v. Manifold*, 1 Mau. & Selw. 294.

(14) The wife of an acting executor who does not take any beneficial interest under the will, is a competent witness to prove the execution of it. *Bettison v. Bromley*, 12 East, 250. And a will is well attested, though one of the subscribing witnesses be executor in trust under it. *Phipps v. Pilcher*, 1 Madd. 144. S. C. 2 Marsh. 20. and 6 Taunt. 220.

Where the will concerns only personal estate, if the same be written in the testator's own hand, though it has neither his name nor his seal to it, nor witnesses present at its publication, it is good; provided sufficient proof can be had that it is the testator's hand-writing. And if written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions, and approved by him, it hath been held good for the personal estate. But it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses *P* (15). When the witnesses are omitted, the ordinary,

P 2 Black. Com. 501.

But where an estate in fee upon the determination of a life-estate was devised to the wife of A. B., and A. B. was one of the attesting witnesses to the will, it was held that he was not a good witness, and that the statute of 25 Geo. II. c. 6. did not restore his competency. *Hatfield v. Thorp*, 5 Barn. & Ald. 589.

(15) But although the testator's seal, and the attestation to the will, and under certain circumstances even his signature may be omitted, and still it may operate as an available disposition of personal estate; yet if, on the omission of either of those solemnities, a fair presumption may be raised of an abandonment of intention on the part of the deceased, or that his intention was merely ambulatory, the instrument will have no effect. Thus, where the party wrote a paper purporting to be a testamentary disposition of his property, to which a clause of attestation was added, but not filled up, the court thought it reasonable, from the want of witnesses, to infer that he had changed his mind, and pronounced for an intestacy. So, where the party had merely sealed the paper propounded for a will without signing it, from the omission of the signature, the inference and decision were the same. In these and the like cases, the framer of the instrument appears evidently to have contemplated a further solemnity, as essential to its perfection; and such solemnity not having been superadded, and the instrument being left inchoate and imperfect, a change of intention may reasonably be presumed. *Matthews v. Warner*, 4 Ves. 186.

before he grants probate, will require the testator's handwriting to be proved, or, if another person wrote his will, that the writing or will produced is his will; whereby not only an extraordinary expence will be occasioned even when a personal application is made, but perhaps a deal of trouble to the executor in procuring sufficient proof.

Where the will, only concerns copyhold lands, the same having been surrendered to the use of the will (16), although the will be not attested by any witnesses, it shall direct the uses of the surrender; for the statute of frauds, which requires the testator's signing in the presence of three witnesses, is confined only to such estates as pass by the statute of wills, of the 34 & 35 Hen. VIII. which doth not extend to copyholds, whereon we have treated more fully towards the former part of the preceding chapter.

With respect to persons who may be made executors, all persons are capable of being executors that are capable of making wills, and many others besides; as feme-coverts, and infants, nay, even infants unborn, or *in ventre sa mere*, that is, in the mother's womb, may be made executors. But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minori ætate*, during the minority^a (17). Yet, if there be

^a 2 Black. Com, 503.

5 Ves. 23. *Ex parte Fearon*, Ib. 644. *Coles v. Trecothick*, 9 Ves. 249. *Warner v. Warner*, 1 Meriv. 503. But such presumption may be rebutted by evidence, as by shewing that the party was suddenly arrested by death, or incapacitated by illness before the instrument could be conveniently perfected, or by proving his recognition of it *in extremis*. *Baillie v. Mitchell*, in Prerog. Court, 1805.

(16) A surrender to the use of the will, when matter of form, is not now necessary. See ante, p. 162. n. 1.

(17) At common law an infant might execute the office of executor at the age of seventeen. But by stat. 38 Geo. III. c. 87. s. 6. he is disqualified from acting in the executorship till he attains the full age of 21 years, and an administrator is substituted to act for him in the interval.

two executors, one whereof is under age, he of full age may solely prove the will ^r.

Although there are very few persons but may be made executors, yet it behoves the testator to beware of whom he appoints executor. — It is said, if a creditor constitutes his debtor his executor, it is a release or discharge of the debt, whether the executor acts or no : provided there be assets sufficient to pay the testator's debts : for, though this discharge of the debt shall take place of all legacies, yet it will not be allowed against the testator's creditors ^s (18). And if

^r 1 Lev. 181.

^s 2 Black. Com. 512.

(18) In Co. Litt. 264. b. Lord Coke says, if the obligor make the obligee his executor, this is a release in law of the action, but the duty remains, for which the executor may retain so much goods of the testator. The learned editor of that work (Mr. Butler) has stated (Ibid. n. 1.), that " what Lord Coke advances respecting obligors and obligees, holds equally between all other creditors and debtors, but it must be attended with the following observations : a debt is only a right to recover the amount of the debt by way of action, and as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it is to be considered as a specific bequest or legacy devised to the debtor to pay the debt, and therefore, like other legacies, it is not to be paid or retained till the debts are satisfied ; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors. In this case, it is the same whether the executor accepts or refuses the executorship. On the other hand, if the debtor makes the creditor his executor, and the creditor accepts the executorship, if there are assets, he may retain his debt out of the assets, against the creditors in equal degree with himself ; but if there are not assets, he may sue the heir, when the heir is bound." See *Wankford v. Wankford*, 1 Salk. 299. *Selwin v. Brown*, 4 Bro. P. C. 179. Forr. 243. 8 Vin. Abr. 198. 2 Eq. Ca. Abr. 46. In addition to the latter part of Mr.

there be several joint debtors, and the creditor makes one of them executor, the debt is extinct in law^t; and if the husband of a woman that is made executor be indebted to the testator, this making of the wife executor is a release in law^u. But as to making a debtor executor being a release in law, Wentworth says, "yet doubtless (methinks) such a debtor made executor should hold himself restrained in conscience from taking benefit thereof, if (the debt remitted) there shall want to satisfy either debt or legacy of the testator; and I doubt whether a court of conscience may not justly so order^x." — This now is not to be doubted, it being demonstrated in a very late case, where two who were indebted to the testator in unequal sums were made executors, and it was held no release of the debts, and that they were trustees for the next of kin, as to the residue.

The case was, Goodinge, the testator, by will dated 10th June, 1783, gave to the defendant his brother Henry Goodinge 500*l.*, and to his nephew, the defendant Henry Goodinge, jun. 500*l.* and appointed them executors, but made no disposition of the residue. He also wrote a letter to the nephew, in which, among other things, he referred him to certain let-

^t Went. Off. Exec. 31, 32.

^x Went. Off. Exec. 31.

^u *Ibid.* 207.

Butler's note, the case of *Dorchester v. Webb*, Sir W. Jones, 345. S. C. Cro. Car. 372. may be noticed, in which it was laid down, that when an obligor makes the obligee and another his executors, and the obligee refuses, the debt is neither released nor discharged, and the obligor may sue the assets. The same doctrine was also held in the more recent case of *Rawlinson v. Shaw*, 3 T. R. 557., where a debtor having made his creditor and another person executors, the creditor neither proved the will nor in any manner acted as executor, but brought his action against the other executor, and it was determined that as the creditor had not possession of the property of the testator *quod* executor, he stood in the same situation as any stranger, and might equally sue the person who had the legal possession of that property.

ters in Chambers's Dictionary as worth looking for, and directed him to pay the plaintiff Carey 200*l.* — Henry Goodinge, the brother, was indebted to the testator 7000*l.*, and Henry Goodinge, jun. was indebted to him 1000*l.* at the time of his decease. Upon searching the titles referred to in Chambers's Dictionary, bank-notes were found to a considerable amount.

The bill was by the next of kin, and prayed an account of the personal estate of the testator, and particularly of the sums in which the executors were indebted to him, and payment of the same to the plaintiffs. — For the defendants it was contended. 1st, That the appointment of the brother and nephew executors, is an extinguishment of the debt. This is clearly so at law; and there is no case in this court where it has been held otherwise, except where there has been a direct gift of the residue. That was the case in *Brown v. Selwin*, For. 240., and even there Lord Talbot spoke of it as an undecided point; but there is no case where it has not been held an extinguishment against the next of kin. — 2d, That, having (by this mean) unequal legacies, and there being no disposition of the residue, the defendants as executors were entitled to it. — Lord Chancellor said, he thought it had been a settled point in this court, that the appointment of the debtor executor, was no more than parting with the action: and declared it a trust for the next of kin^v (19).

With respect to making a married woman executrix, attention should be had to the probity of the husband; as the wife in such case cannot act alone, and if the husband commit a *devastavit* the wife will not be liable^s (20). And

^v *Carey v. Goodinge*, 3 Bro. Cha. Rep. 110.

^s *Benyon v. Collins*, 2 Bro. Cha. Rep. 323.

(19) That a trust is in such a case raised in equity, is now so perfectly settled, that, in the case of *Berry v. Usher*, 11 Ves. 90., the point was given up without argument.

(20) The position here laid down, although justified by the authority cited in support of it, has been successfully

previous to making an executor, due attention should be had to his probity, as well as his circumstances, as great power devolves on him on the testator's death, which is demonstrated in various parts of this work, and shewn that the personal estate vests in him immediately thereon; so if the testator has money in the stocks or public funds, the executor may in general demand a transfer thereof into his own name or the name of any other person, and if refused, compel such transfer to be made by an action at law; and where a residue was specifically given, it was held in a case before the court of chancery in 1791, that the bank had no right to restrain the executors from transferring the funds. In this case the bank in their bill insisted upon its having been their custom, ever since the institution of the bank, that where any share or interest in the funds transferrable at the bank, is specifically bequeathed to one or more legatee or legatees, and no trustee or trustees are appointed, to permit the interest so bequeathed to be transferred to the legatee or legatees only, and to no other person or persons; and where any trustee or trustees are appointed, to suffer the interest to be transferred to the trustees only, but not to permit them to sell or transfer the same to any other person than the legatee or legatees beneficially interested therein; and therefore prayed an injunction to restrain the defendants the executors from proceeding at law.

For the bank it was argued that, where there are no trustees appointed, still the bank must enter the whole will^a,

^a When the probate of the will is deposited at the bank, the bank usually causes so much thereof as relate to the testator's interest in the stocks to be entered in the proper

offices (according to the acts of parliament), and subject the same to the uses of the will, by causing entries to be made in the respective transfer books.

controverted by Lord *Redesdale*, and it seems clear that although the *devastavit* is the act of the husband, yet it is an act for which the wife, after the determination of the coverture, is responsible; because, according to the language of the cases, it was her folly to take a husband who would so misconduct himself. *Adair v. Shaw*, 1 Sch. & Lef. 258.

and must, consequently, see to the disposition of the property as co-trustees, or as a check upon the other trustees. That though the bank may not be liable in case of a misapplication, yet the bank have a right to the common privilege of trustees, to have the trusts administered by this court, which is the proper and peculiar characteristic of its jurisdiction.—For the defendants, it was argued that how proper soever the practice of the bank might be in the case of a specific legacy or stock, it was not so in the case of a residue; and, in this case, it was a simple residue of a personal estate, which must necessarily vest in the executor, for payment of debts and other necessary purposes. In the case even of specific legacies, and of terms of years, they do not vest in the legatees till after the assent of the executor, who may want them for the payment of debts; till the assent of the executor the legatees of a bond cannot discharge it. This is like any other specific legacy, and the defendants are therefore entitled to call upon the bank for a transfer.

Lord Chancellor acceded to this idea of the residue, in the present case, being like a specific legacy, and requiring the assent of the executor, that the act of parliament giving a power to devise, and treating it as personal property, it must be subject to all the incidents of a gift of personal property; and, therefore, that the bank must permit a transfer of the stock: and dissolved the injunction ^b.

Hence may be perceived that the bank are very vigilant in taking care to preserve the property of individuals bequeathed by will as far as enabled so to do, but that they cannot preserve the same by withholding a transfer thereof unless empowered by the will; wherefore it behoves testators to be careful to bequeath in such manner as to vest sufficient authority in the bank for restraining a transfer into the names of others than those designed to hold and enjoy the property bequeathed; as thereby misfortunes that have too often happened may be sufficiently guarded against.

^b *Bank of England v. Moffatt*, 3 Bro. Cha. Rep. 260.

One instance of those misfortunes, and which has lately happened, we shall here relate. — John Shakeshaft, by will, left 2000*l.* 3 *per cent.* bank annuities, to his executors after-named in trust to pay the dividends to Ann Shakeshaft his wife for life, afterwards to George Shakeshaft, his son, for life, and after his death the principal to be equally divided among his children at twenty-one; but if they all died under that age, then to be divided among all the children of his brother Richard Shakeshaft; and he appointed Samuel Kempson and Richard Shakeshaft executors. — Soon after his death, *viz.* in 1782, the two executors joined in selling out the sum of 2000*l.* 3 *per cents.* and Kempson permitted Richard Shakeshaft, to take it to his own use, upon giving an undertaking in writing to replace it upon demand; and Richard Shakeshaft continued to pay the amount of the dividends upon the stocks sold out to Ann the widow till his death, in 1790, when he died insolvent, and then the transaction of the sale of the stock was discovered. — In December 1790, Kempson became a bankrupt. In consequence of which George Shakeshaft, the son before mentioned, petitions the Lord Chancellor to be at liberty to prove under Kempson's commission, on behalf of himself and the other parties interested in the 2000*l.* bank annuities, which was opposed by the assignees of Kempson; but his lordship ordered that the petitioner should be at liberty to prove, and directed the assignees to pay the dividends into the bank, subject to further orders^c.

If a creditor of the testator is intended to have a legacy bequeathed to him, care should be taken in being explicit; as it is an established rule, that a legacy given by a debtor to his creditor, which is equal or greater than the debt, shall be presumed to be intended in satisfaction of the debt; yet this rule, although acknowledged to be fully established, being thought a strict rule, in some late cases a dissatisfaction has been expressed with regard to the principle upon which it proceeds, and the court has been anxious to collect

^c *Ex parte Shakeshaft*, 3 Bro. Cha. Rep. 197.

from the *will* circumstances to rebut the presumption; and where the payment of debts hath been particularly mentioned in the will, the presumption of the testator's intention, that the legacy given should be in satisfaction of the debt, hath been taken away, and the creditor decreed both debt and legacy^d. So where the legacy hath not been equally beneficial with the debt in some particular, (although it may have been more so in another), as in time of payment, or in point of certainty^e (21).

^d 1 P. Will. 410. 3 Atk. 65.

^e 1 P. Will. 410. n. 4th edit.

(21) It is a general rule, that when a person indebted to another bequeaths to him as great or a larger sum of money than the debt, without noticing it, the legacy will be considered in payment or satisfaction of the debt. *Brown v. Dawson*, Prec. Ch. 240. *Fowler v. Fowler*, 3 P. Wms. 354. *Gaynon v. Wood*, 1 Dick. 331. This, however, is merely a rule of construction, and the principle of it has been much disapproved of by the court of chancery, because no satisfactory reason can be assigned why a testator, when there is not a deficiency of assets, may not intend a benefit to his creditor, *ultra* the payment of his debt, as well as to any other legatee named in the will. The disposition of the court, therefore, is to form exceptions to the rule in all possible cases. Accordingly, if the legacy be *inferior in amount* to the debt, the former will not be considered as given in *part* payment or satisfaction of the latter. *Eastwood v. Vinke*, 2 P. Wms. 614. *Atkinson v. Webb*, 2 Vern. 478. So when the debt and legacy are of equal amount, if there be a difference in the times of payment, as where the debt is payable immediately, but the payment of the legacy is postponed for however short a period, the legacy will not be a satisfaction, because it is not equally beneficial to the legatee. *Nicholls v. Judson*, 2 Atk. 300. *Mathews v. Mathews*, 2 Ves. sen. 635. 2 Fonbl. on Eq. 331. n. (m). And if the legacy be conditional, or be given on a contingency, it is not a satisfaction, for it shall not be supposed that the testator intended an uncertain recompense in satisfaction of a certain demand. *Crompton v. Sale*, 2 P. Wms. 553. 2 Fonbl. 331. So a legacy is not a satisfaction of a debt due on an open or running account, for the testator

Where a debtor makes his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator^f.

Formerly it was a settled notion that where there was no residuary legatee appointed by the will, the surplus or *residuum* devolved to the executor's own use, by virtue of the executorship. But now there is this restriction, that although where the executor has no legacy at all, the residuum shall in general be his own, yet wherever there is a sufficiency on the face of a will (by means of a competent legacy or otherwise) to imply that the testator intended his executor should *not* have the residue, the undivided surplus of the estate shall go to the next of kin; the executor then standing upon exactly the same footing as an administrator, who by the statute 22 & 23 Car. II. c. 10. must make distribution

^f *Rawlinson v. Shaw*, 9 Durnf. & East. Rep. 557.

might not know whether the balance was in favour of the legatee or not. *Rawlins v. Powell*, 1 P. Wms. 297. Neither is it, as it seems, a satisfaction of a debt due on a bill of exchange, or other negotiable instrument. *Carr v. Eastabrooke*, 3 Ves. 561. And where the debt is contracted by the testator, subsequent to the making of the will by which the legacy is given, it shall not be a satisfaction, since the testator cannot be supposed to have had it in contemplation to satisfy a debt, which was not then in existence. *Cranmer's case*, 2 Salk. 508. *Thomas v. Bennet*, 2 P. Wms. 343. But where there is a deficiency of assets, the legacy will in all cases be construed a satisfaction. Toller on Executors, 338. The question of satisfaction being, in these cases, a mere rule of presumption, it may, like all other presumptions, be repelled or confirmed by parol evidence. *Pole v. Lord Somers*, 6 Ves. 309. And in a late case it was held that parol declarations by the testator were admissible in evidence to repel the presumption of the satisfaction of a debt, by the bequest of a legacy of greater amount, even where such declarations were not contemporaneous with, but subsequent to the making of the will; and although the expressions in the will afforded an inference in favour of the presumption. *Wallace v. Pomfret*, 11 Ves. 542.

thereof to the intestate's next of kin^s; and for making this distribution it may be observed that an executor is compellable thereto by the court of chancery^h; where it has been determined, that, if there be no kindred, the executor shall stand trustee for the crown, to whom the undivided surplus shall goⁱ, as in the case of a person dying wholly intestate, mentioned in the former part of this work^k. — Much litigation having been with respect to executors claiming the undivided surplus, we shall treat more largely hereon under a subsequent head.

There are very few persons but may be devisees, or legatees, and take either real or personal estate by devise; the latter of which, on the testator's death, vests in the executor, and cannot be taken without his consent^l, he being the person to answer the testator's creditors; but with the former an executor, as such, has no more concern than an administrator heretofore mentioned^m; for on the testator's death, the real estate immediately vests in the devisee, or person to whom it is devisedⁿ; whereby formerly great inconveniences arose, as creditors by bond and other specialties were defrauded of their securities, not having a remedy against the devisee of their debtor; to obviate which the statute 3 W. & M. c. 14. was made, and thereby the devise, against such creditors, is deemed void, and they are enabled to maintain their actions jointly against both the heir and devisee, as has been shewn^o (22).

A married woman, or, as the law terms her, a feme-covert, although she cannot be a grantee to her husband, as a man cannot grant any thing by deed to his wife, or enter into a covenant with her; for that would be to suppose her separate existence; but a woman may be attorney for her hus-

^s 2 Black. Com. 514.

ⁱ 2 Black. Com. 512.

^h Page 83.

^m Page 109.

^l *Middleton and Spicer*, 1 Brown's Cha. Rep. 201.

ⁿ Co. Litt. 111.

^k Page 104.

^o Page 118.

(22) And in certain cases real estate in the hands of a heir or of a devisee, is made assets for the payment of simple contract debts. See ante 55. n. 17.

band, as that implies no separation; and an husband may bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by death^r.

An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it, and it is enabled to have an estate limited to its use, and to take afterwards by such limitation as if it were then actually born; and if a devise is to children and grandchildren living at the time of the testator's death, a child in the mother's womb might in such case be so far regarded as to be looked upon as living^q, and will have the same share as any child born before the testator's death. And where the testatrix gave her real estate to trustees, upon trust to permit her nephew, J. C. to receive the rents and profits for his life, and after his death to sell the estate, and divide the money amongst all and every the child and children of J. C. at the age of twenty-one; also gave her personal estate to the same trustees, in trust, to divide the same amongst all the children of her said nephew at twenty-one, and directed her nephew to maintain the children out of the rents and profits, and gave the trustees power to apply any part of the interest of the personal estate, for the maintenance of the children.—The question was, whether the plaintiff, a child born after the death of the testatrix, was entitled to a share of her estate: all the other persons were born before the making of the will.—The Master of the Rolls held the plaintiff to be entitled to a share with the other children^r.

Yet in a later case it was said, that this seems a very strained determination; and where the testator devised to trustees, and directed the yearly sum of 100*l*. of the rents and interest of residue to be paid and applied by them unto each of his two daughters, S. A. and D. K. during their lives, and the residue of the rents and interest, for the maintenance and education of all the children of his said two daughters, S. A.

^p 1 Black. Com. 442.

^q 4 Burn's Eccles. Law, 146.

^r *Congreve v. Congreve*. 1 Bro. Cha. Rep. 530.

and D. K. share and share alike, until the youngest of the said grandchildren should attain twenty-one, and in case of the death of any of them before the youngest should attain twenty-one, who should have been married, and who should have at his or her decease a child or children, then testator directed, that such child or children should be entitled to the same share which their deceased parents would have received, in case they had respectively lived till the youngest of such child or children should have attained twenty-one; and when such youngest child should have attained twenty-one, then testator gave one full and proportionable share of the capital thereof, to the proper use of such his said grandchildren as should be then living, and the child or children of such as should be dead.

D. K. at the death of the testator, had six children; after his death she had another child; and S. A. had four children, but, after his death had two other.—The question was, whether the children of testator's daughters, born at the time of his decease, were to take exclusively of those born after his death, or they were all entitled?

Lord Chancellor said, when the gift was general, it was always confined to the death of the testator; where there is a gift for life, or the distribution is postponed to a future time, then the children born during the life, or before that time, are let in. *Congreve v. Congreve* seems a very strained determination; because when the first child attained twenty-one, the division must be made. His lordship finally determined in favour of the children alive at the decease of the testator^a (23).

^a *Hughes v. Hughes*, 3 Bro. Cha. Rep. 352.

(23) In these bequests to children, or other persons who are designated as a class, the court is always anxious to construe the period of distribution as late as it can, in order to include the greatest number of persons within the testator's bounty. And, actuated by that anxiety, it has laid down this rule, that any child coming into *esse* before a deter-

What has been here mentioned concerning children, must be understood with respect to legitimate children, and not of bastards, heretofore described^t; for a devise to those in the mother's womb, or before born, is void^u. Yet, if a bastard is born at the time of making the will, whereby either real or personal estate is given to him, he is capable of taking the same; but it is safe to describe a bastard, in the will, as the natural son or daughter of A. B. [his mother], especially if he be a tender infant, that has not got a name by reputation (24). Aliens are not capable of holding lands, as

^t Page 105.

^u Gilb. on Wills, 161.

minate share becomes, by the terms of the bequest, distributable to any one, is included. Therefore when legacies are given to a designated class of individuals, payable at a future period, as to the children of B, when the youngest shall attain 21, or be married; or to be divided among them upon the death of C, any child, who can entitle himself under the description at the time of distributing the fund, may claim a part of it, viz. as well those children living at the period of distribution, though not born until after the testator's death, as those born before, and living at the happening of that event. *Prestcott v. Long*, 2 Ves. jun. 692. *Hoste v. Pratt*, 3 Ves. 730. *Barrington v. Tristram*, 5 Ves. 345. *Whitbread v. St. John*, 10 Ves. 152. *Gilbert v. Boorman*, 11 Ves. 238. *Leake v. Robinson*, 2 Meriv. 382. And it is now settled that a child *in ventre sa mere*, at the period of distribution may take. *Clarke v. Blake*, 2 Bro. C.C. 320. *Miller v. Turner*, 1 Ves. 85. *Theelluson v. Woodford*, 4 Ves. 322. 334. But where the gift to children is to take effect in possession immediately on the death of the testator, after-born children cannot be admitted to participate. *Scott v. Harwood*, 5 Madd. 332.

(24) It is to be collected from Co. Litt. 3. b. that an illegitimate child cannot take by the description of child of his putative father, until he has acquired the reputation of being such child; but after he has acquired the reputation of being such child, he may take by that description either under a deed or under a will. See 1 Ves. & Bea. 452.; 1 Madd. 440. But to intitle illegitimate children to take under a will, the intention of the testator that they should take, must appear

has heretofore been mentioned ; and, with respect to some persons incapable of taking a legacy, mention will be made under a subsequent head, in treating on legacies.

by necessary implication upon the will itself; it is not sufficient that from circumstances *dehors* the will, it cannot be doubted but that illegitimate children were intended, for if the instrument itself does not furnish that question, extrinsic evidence is not admissible to raise it, and legitimate offspring alone are considered as the objects of his bounty. Therefore under a bequest to the eldest child, male or female, of A who is unmarried, a natural child of A's will not take, if there be nothing apparent on the face of the will to shew that the testator meant by the word "*child*" to describe an illegitimate child, although it was known to him at the time of making his will that A had only illegitimate children ; but the court, from the circumstance of A being a single man, will intend that the testator contemplated the event of his marriage, and consequently that the bequest was destined as a provision for the eldest of the possible progeny of a future marriage. *Godfrey v. Davis*, 6 Ves. 43. So if a testator, having legitimate as well as illegitimate children, bequeath to "children" generally, the former will alone be supposed to be meant by that term, *Cartwright v. Vaudry*, 5 Ves. 530.; unless the testator himself has manifested an intention that both classes of children should be comprehended. *Swaine v. Kennerley*, 1 Ves. & Bea. 469. Where, however, the intention of the testator to provide for illegitimate children is apparent, they will take. Thus where an unmarried man bequeathed certain sums to his "*children*," and it appeared *ex visceribus* of the will, that he must have had it in his contemplation to provide for natural children, they, having obtained a name by reputation, were admitted to take. *Beachcroft v. Beachcroft*, 1 Madd. 430. So also under a devise by a married man, having no legitimate children, "to the children "which I may have by A, and living at my decease," natural children, who had acquired the reputation of being his children by her before the date of the will, were held entitled, as being upon the whole will intended and sufficiently described. *Wilkinson v. Adam*, 1 Ves. & Bea. 422; see also, *Bayley v. Snelham*, 1 Simons & Stuart, 78. And the rule of law does not require that an illegitimate child should actually be born in order to be capable of taking; for if such a child

Having thus considered those propositions, we shall now proceed to consider the manner of bequeathing to married women and infants, and of appointing guardians: conditions not to trouble executors, and for preventing indiscreet marriages.

When any estate or effects is intended for a married woman, it is generally devised or bequeathed to some person in trust for her, or to be for her sole and separate use, with directions that her receipt alone shall be a sufficient discharge for the same; as thereby to prevent what is given being subject to the husband's control. If any real estate is devised to her in fee-simple, and without any restriction, it immediately vests in her on the testator's death, and will

in ventre sa mere, is so described as to ascertain the object intended to be pointed out, it may take under that description; as in the case of a bequest to the natural child with which a woman is now *enseint*, *without reference to any person as the father*; nor would such a bequest be invalidated by the testator giving as a reason for the legacy, that he believed he was the father of such child. *Gordon v. Gordon*, 1 Meriv. 141. But if the bequest is to an illegitimate child with which a woman is pregnant by a *particular man*, *the testator for instance*, the bequest altogether fails. *Earl v. Wilson*, 17 Ves. 528. The reason of the distinction is, that in the latter case, the foundation of the bequest is the fact of the child being the child of the testator, and as the truth of that fact cannot, on grounds of public policy, be suffered to be sustained by evidence, the rule applies, that a man cannot give to an illegitimate child, *as his own*, until it is known to be, or has acquired a reputation of being his. But, in the former case, where the bequest is to the child with which a woman is pregnant generally, describing it merely as the future offspring of the mother, no uncertainty prevails, and there is no fact to be tried which can possibly lead to indecent evidence. — When the intention in favour of illegitimate children is clear, they may, if they have obtained a name by reputation, take either by a description amounting to a *designatio personarum*, or, without being named, they may take under the general description of children, as a class. *Metham v. The Duke of Devon*, 1 P. Wms. 529.; *Wilkinson v. Adam*, and *Beachcroft v. Beachcroft*, *supra*.

have the same effect as to the husband's curtesy as heretofore shewn.* And if any legacy or personal estate is given to a married woman absolutely without any restriction, it will be as if the same were given to the husband, as we shall see under a subsequent head, where further mention will be made concerning bequests to married women (25). When any real estate is intended for an infant, it is usual to devise it to

* Page 119-122. The husband being entitled to the rents and profits of the wife's real estate during her life, and to hold the same as tenant by curtesy after her death, in case he becomes a bankrupt, such interest as he had in the estate will be assignable by the commissioners to the assignees for his creditors.

(25) In equity, as at law, a gift to the wife is a gift to the husband, who, being bound to maintain the wife, is entitled to her property. A court of equity will, however, execute a trust for the sole and separate use of the wife, where the intention of the donor to that effect is unequivocally declared. The doctrine as to what expressions will be holden sufficient to constitute a trust of property for the separate use of a *feme-covert*, is well collected and arranged by Mr. *Clancey*, in his *Treatise on the Rights of married Women*, p. 41. A bequest of bonds to a married woman, "whenever she should demand or require the same," *Dixon v. Olmius*, 2 Cox, 414.; a bequest in trust, "to pay the annual produce into her proper hands," *Hartley v. Hurle*, 5 Ves. 545.; a legacy to be vested in trustees "the income arising therefrom to be for her sole use and benefit," *Adamson v. Armitage*, 19 Ves. 416. S.C. Coop. 283.; a bequest "for her sole and separate use and benefit, and her receipts to be a sufficient discharge;" *Wells v. Sayers*, 4 Madd. 409.; a bequest "to be at her disposal," *Kirk v. Paulin*, 7 Vin. Abr. 95. pl. 43.; and a bequest "to her own use, independent of her husband," *Wagstaff v. Smith*, 9 Ves., 623., have all been considered gifts to her separate use. But a legacy to a married woman "to and for her own use and benefit" does not, it seems, give a separate estate, *Roberts v. Spicer*, 5 Madd. 491. But see *Ex parte Ray*, 1 Madd. 199.; and it clearly does not, if the testator shews on the face of his will, that he knew the technical form of excluding the husband. *Wells v. Sayers*, 4 Madd. 409. So a mere bequest to her for life will not have that effect. *Brown v. Clark*, 3 Ves. 166. *Lamb v. Milnes*, 5 Ves. 517. *Jacobs v. Amyatt*, 1 Madd. 376. n.

some person or persons in trust for him till he attain twenty-one years of age, with directions to the trustees how to manage the same in the interim. So, with respect to any legacy or personal estate that may be bequeathed to an infant; for the law will not trust an infant with any real estate; and as to legacies or personal estate, where the testator has not taken necessary care to preserve it for an infant, the courts wherein legacies are to be sued for, when applied to, are not negligent in taking the utmost care for the benefit of infants; the expense of which application may be saved by due care being taken in making the will. Trustees named in the will may also be appointed guardians by any father, who, we have seen, hath power to dispose of the custody of his children¹; and the same, or such others as the testator shall choose, may be made executors.

There is no decided case that guardians can be appointed for a child by a stranger, during the life of the parent. If such be so appointed, and it be laid before the court of chancery how the child is disposed of, the court will take care that the child shall be educated according to his expectations² (26). But where a father by his will named guardians for his natural child; on petition that the same might be appointed by the court, and they appearing in court and consenting to accept such guardianship, the master of the rolls thought there was no necessity to refer it to the master, to approve of proper persons to be guardians, the father having named them by his will, though, strictly speaking, he could not appoint testamentary guardians to his natural child. And his honour made the order accordingly³. And the

¹ Page 130.

² *Ward v. St. Paul*, 2 Bro. Cha.

³ *Powel v. Cleaver*, 2 Bro. Cha. Rep. 583.
Rep. 500. 510.

(26) In a late case where a legacy was given to a father, on condition that he did not interfere with the education of his daughter, the court, on a bill by the father for the legacy, required from him security to that effect, to be approved by the master, *Colston v. Morris*, 6 Madd. 89.

same had been done by the lord chancellor in the year 1788^b (27).

In default of the father's appointing a guardian, infants at fourteen years of age, whether male or female, may choose their own guardian (28); and for the personal estate, the ordinary usually assigns him; but for the real estate, it is the province of the lord chancellor to assign a guardian. The power and reciprocal duty of guardian and infant, who is termed in law the ward, during the continuance of the guardianship, are the same as that of father and child; and the infant cannot be sued but under the protection and joining the name of his guardian, he being to defend him against all attacks, as well by law as otherwise; and when the infant comes of age, must give him an account of all that he hath transacted [on his behalf, and answer for all losses occasioned by his wilful delay or negligence. But an infant is allowed to sue either by his guardian or *prochein amy*, that is, his next friend, who may be any person that will

^b *Peckham v. Peckham*, 2 Bro. Cha. Rep. 584.

(27) See *Chatteris v. Young*, 1 Jac. & Walk. 106.; where Sir Thomas Plumer, on the authority of these cases and without a reference, appointed, as guardians, persons who had been nominated by a testator to be guardians of his natural children, and who consented to undertake the guardianship.

(28) The only authority I can discover in support of this proposition is a passage in Co. Lit. 87. b., where it is laid down, that if a man die seised of an hereditament, which does not lie in tenure, the heir being within the age of fourteen years, and having no guardian assigned, may choose one for himself. But this passage is at variance with a late case, in which an infant of the age of seventeen, having appointed a guardian by deed, it was nevertheless held, that such an appointment did not supersede the duty and authority of the court of chancery, and it was accordingly referred to the master to consider of a proper person to act as guardian. *Curtis v. Rippon*, 4 Madd. 462.

undertake his cause^c; and it frequently happens that an infant institutes a suit in equity against a fraudulent guardian, who, if he hath abused his trust, the court will check and punish, and sometimes proceed to the removal of him, and appoint another in his stead. — To prevent disagreeable contests with young gentlemen, it has become a practice with many guardians, of large estates especially, to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court^d.

As to conditions not to trouble executors, if a legacy is given on condition not to dispute the will, and the legatee commences a suit whereby he disputes the validity of the will, this is no forfeiture of the legacy, if there was justifiable cause of contesting it^e. And even though there is no probable cause, yet where a legatee, or other person interested, hath a right to see the will proved in solemn form, his making use of the right cannot, as it seems, be deemed a disturbance. — The testator gives to B a legacy, on pain of forfeiture of it, in case he should give his wife, whom he made executrix, any trouble in relation to his estate; B brings his bill against the wife, for which there was very little colour, and amongst other things demands his legacy. The chancellor was of opinion that the suit was very frivolous, but would not declare the legacy forfeited^f. But in a case where a person by his will gave a legacy to his daughter, provided that if she or her husband refused to give a release, or should put the executor to any trouble, the same should go over to her sister's children. The daughter and her husband, being within the city of London, sue for her orphanage part. It was decreed that the legacy was forfeited; for however it might have been construed to be only *in terrorem*, yet being devised over, and by that means a right to this legacy being vested in a third person,

^c Co. Litt. 135. n. 1. 13th edit.

^d 1 Black. Com. 463.

^e 3 New. Abr. 479.

^f Cha. Ca. 1.

a court of equity could not divest it or call it back again^s (29).

Generally, by the ecclesiastical law, all conditions against the liberty of marriage are unlawful, as being a restraint on the natural liberty of mankind, and an hindrance to the propagation of the species; and if the condition be, that the legatee marry according to the appointment, arbitrament, or consent of some other person, it is rejected as unlawful^b.

^s *Cleaver and Spurling*, 2 P. Will. 528.

^b *Godolphin's Orphan's Legacy*, 45.

(29) Legacies given to persons with a condition not to dispute the validity of the will, or the bequests contained in it, are not obligatory but *in terrorem* only; so that if there exist *probabilis causa litigandi*, an endeavor to set them aside will be no forfeiture. *Powell v. Morgan*, 2 Vern. 90. *Norris v. Burroughs*, 1 Atk. 404. *Lloyd v. Spillet*, 3 P. Wms. 344. *Ingram v. Strong*, 2 Phillim. 315. But if, as in the case of *Cleaver v. Spurling*, cited in the text, the legacy to which such condition is annexed be limited over upon a breach of it, the non-observance of the condition will create a forfeiture, and for this reason, because immediately upon the breach, an interest in the legacy springs up and vests in a third person, viz. in the person to whom it is given over, so that a court of equity cannot, without a violation of its principles, deprive such person of his right. If, however, the limitation over have no other effect than what would be produced by operation of law, in case no such limitation had been made, the express limitation will not prevent the court from relieving against a breach in instances within its general principles; accordingly, if the legacy to which such a condition is annexed, be given by the testator to his *executors* upon non-compliance with the condition, the secondary bequest to the executors would not preclude the jurisdiction of the court from relieving against such a breach; for the disposition made on the event of the condition broken, being the same which the law would have provided, if no such disposition had been expressly made, the principle, which prevents the interference of the court in cases where the limitation over is in favor of a stranger, does not apply. *Cage v. Russell*, 2 Ventr. 352.

But if the conditions are only such as whereby marriage is not absolutely prohibited, but only in part restrained, as in respect of time, place, or person, then such conditions are not absolutely rejected¹; as for instance, where the condition is not to marry before the age of twenty-one years; but if it is continued to an unreasonable length of time, it is otherwise (30). So if the condition be not to marry a particular person, or a widow, or one of any particular place, it is to be performed^k.

In the temporal courts, the distinction seems generally to have been where the legacy is devised over to another, and where it is not devised over. In the former case it hath been held that the restraint shall be good, so as the legacy shall not be due, unless the condition be performed (31);

¹ Godolphin's Orphan's Legacy; ^k *Ibid.*
45.

(30) A condition in restraint of marriage under the age of twenty-one, even where there is no gift over, is held a reasonable and a good condition, because it imposes no other restraint upon the liberty of marriage than was before imposed by the law of the land. *Stackpole v. Beaumont*, 3 Ves. 89. But the legality of a condition restraining marriage without consent for a more protracted period cannot, it seems, be questioned. In *Dashwood v. Lord Bulkley*, 10 Ves. 320., the validity of such a condition was not considered as at all open to controversy, although it was not confined to marriage under twenty-one. And in a more modern case, where the legatee was upwards of twenty-one years of age, when the will was made, and the testator imposed a condition, unlimited as to time, against marriage without consent, Sir *William Grant* considered such a condition obligatory upon the legatee, and she having married without consent, his honor held that she forfeited her legacy. *Lloyd v. Branton*, 3 Meriv. 108.

(31) This must be understood to apply only to those cases where marriage with consent is the only event in which the legacy, by the terms of the bequest, is made to vest. For when a legacy is to vest or be paid, at a particular age, and then there is a clause of forfeiture on marriage without consent, the court will construe such

but in the latter case, where there is no devise over, it hath been held that the proviso or condition is only *in terrorem*, to make the person careful, but not to defeat the legacy¹. Yet here there is a distinction between its being charged on real estate and where it is not; as if a legacy be given to a woman upon this condition, that she marry with the consent of a third person, who, as it may be a parent, guardian, trustee, or executor, and the legacy be to be raised out of a real estate, in this case, if she marry without such consent, although there is no devise over, she shall not have it². But if it is a mere personal legacy, payable out of the personal estate, and there be no devise over, in case she marry without such consent, she will be entitled to it, unless there be a devise over, and if there be, it shall go to whom it is so devised, and she will lose it³. The reason of this distinction is, because the temporal courts, where the legacy is merely personal, and only a charge on the personal estate, follow the rule of the ecclesiastical courts, which hath jurisdiction as to the personalty: but where it is charged on real estate, of which the ecclesiastical court hath no jurisdiction, they follow the rule of the common law courts (32).

A condition annexed to a legacy; that the legatee *shall marry with consent of her mother*, is a valid condition; and upon marriage without such consent shall go to the mother, under a gift of a general residue. The case was as stated

¹ Cha. Ca. 1 Vern. 20.

² *Reynish and Martyn*, 3 Atk.

³ *Pulling and Reddy*, 1 Wilson's 390. *Hemmings and Munkley*, 1 Bro. Cha. Rep. 303.

clause as having relation to a marriage under the specified age. *Knapp v. Noyes*, Amb. 662. *Osborn v. Brown*, 5 Ves. 527. And the legacy being once payable by the legatee having attained the prescribed age, a subsequent breach of the condition relating to marriage cannot affect her right to receive it. *Brydges v. Wotton*, 1 Ves. & Bea. 138.

(32) The decisions upon this subject are collected and very ably arranged by Mr. *Fonblanque* in his *Treatise on Equity*, vol. i. p. 259.

by the Lord Chancellor, who, in delivering his opinion, said, the testator makes four bequests to his daughter, a contingent interest in 5000*l.*, the 10,000*l.* South-sea annuities in question, the freeholds, and the river *Lee* bonds, all upon her living to twenty-one married or unmarried; if she dies before, the first, third, and fourth take no place. Yet the interest of the fourth is to be paid to her separate use during infancy, notwithstanding her coverture. The second bequest may take place before twenty-one, by marriage with consent of her mother. — I suspect that the testator has failed of expressing his full intention concerning the 10,000*l.* He gave it to his daughter, on a double contingency: he seems to have meant it for the mother, on failure of them. But he hath given it over to her also, on another double contingency; the death of the daughter before twenty-one, and unmarried.

About the middle of the present century, doubts arose which divided the opinions of the first men of the age. The difficulty seems to have been in reconciling the cases. The prevailing opinion was, that devises of land should follow the rules of the common law; and legacies of money the rules of the canon law. The question remains unresolved, what is the nature and extent of the rule. An injunction to ask consent is lawful, as not restraining marriage generally. A condition that a widow shall not marry is not unlawful (33). An annuity during widowhood — a condition to marry, or not to marry, *Titius*, is good. A condition prescribing due ceremonies and place of marriage is good — still more is a condition good which only limits the time to twenty-one, or any other reasonable age, provided it be not used evasively, as a cover, intended to restrain marriage generally.

It is agreed on all hands that (however restrictive of mar-

(33) But if the use and enjoyment of personal property be given to her for life, or as long as she continues unmarried, and there be no bequest over in the event of her marriage, her second marriage will not occasion a forfeiture of her life interest. *Marples v. Bainbridge*, 1 Madd. 590.

riage) when the legacy is given over to other uses, the testator shall be deemed to regard those uses. I am of opinion that the daughter, having married at eighteen, improvidently (as far as it appears) and against the anxious consent of the mother, never came under the description to which the gift of the 10,000*l.* South-sea annuities was attached ; it is therefore void and part of the residue* (34).

Thus having proceeded, we come now to the two last propositions under the head of making the will, *viz.* the gift in case of death, and the nuncupative or verbal will.

A gift in case of death, which is called *donatio causæ mortis*, is, when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered to another the possession of any personal goods, (under which have been included bonds, and bills drawn by the de-

* *Scott v. Tyler*, 2 Bro. Cha. Rep. 431.

(34) Whether a mere residuary bequest amounts to a disposition of the legacy in the event of the condition not being performed, has been matter of much controversy. In *Harvey v. Aston*, 1 Atk. 375. Lord Chief Justice *Willes*, and Lord Chief Baron *Comyns* held that it did. Lord *Hardwicke* did not there express any opinion upon the point ; but in the subsequent case of *Wheeler v. Bingham*, 3 Atk. 364., he decided that a residuary bequest was not such a devise over as the rule required. The case of *Scott v. Tyler*, cited in the text, has been sometimes considered as a contrary decision. But it appears from the copy of Lord *Thurlow's* judgment in that case, as reported in 2 Dick. 723., that he thought it had been properly held that a residuary bequest left the conditional legacy *in statu quo*, and that the ground of his decision was, that the daughter never came under the description to which the gift of the 10,000*l.* was attached. What, therefore, may be the effect of a mere residuary bequest, as regards the disposition of the legacy, appears to be doubtful. But it seems clear that an express direction that on the happening of the condition, the legacy shall sink into and constitute a part of the residue, will amount to a disposition over. *Lloyd v. Branton*, 3 Meriv. 108.

ceased upon his banker,) to keep in case of his decease. This gift is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death^p. Such gift, if the donor dies, need not the assent of his executor: yet it shall not prevail against creditors^q; for being given in case of the donor's death, and in nature of a legacy, it would be fraudulent as against creditors^r. In every such gift there must be a delivery made by the party; and nothing can operate as such, without having been delivered in the testator's lifetime, by him or his order^s. — Where a man by will disposed of personal estate, and afterwards by parol gave 100*l.* bill to one to deliver over to his nephew, if the testator should die of that sickness, it was held good^t. So where the husband upon his death-bed delivered to his wife a purse of 100 guineas, bidding her apply it to no other use than her own, and also drew a bill on his goldsmith, to pay her 100*l.* for mourning^u.

And where a bond for 100*l.* was given by one Spackman to Sarah Bailey, which Sarah Bailey delivered to the defendant, saying, in case I die it is yours, and then you have something. Sarah Bailey died intestate, and her administrator brought a bill to have the bond delivered up. But by Lord Chancellor Hardwicke. This is a sufficient *donatio causâ mortis* to pass the equitable interest of this bond upon the intestate's death. The question in this case was, whether the nature of the property was capable of being so given. His Lordship held it might, as well as a specific chattel; though no legal property passed thereby, nothing but the paper, a bond being evidence of a debt, and the intent being to give the debt, not the paper, he held it a good *donation mortis causâ*, comparing it to the property which passed by assignment of a bond, which passed nothing in point of law, and

^p 2 Black. Com. 514.

^q *Ibid.*

^r 1 P. Will. 406.

^s 3 P. Will. 357.

^t *Drury v. Smith*, 1 P. Will. 404.

^u *Lawson and Lawson*, 1 P. Will. 441.

the assignee must make use of the other's name for recovering on it *.

But in the case of *Ward and Turner* †, (in which is collected all the law upon the subject of donations *causa mortis*, and particularly considered what shall be a sufficient delivery of different kinds of property to give effect to such donations), it was held by Lord Hardwicke, that a delivery of receipts for South-sea annuities was not sufficient, (though there was strong evidence of the intent;) and that it could not be done without a transfer, or something amounting to that; and all the anxious provisions of the statute of frauds will signify nothing, if donations of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and it would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of authorities. And considering how much of the personal estate of this kingdom is now vested in stocks and funds, his lordship said he was of opinion not to carry it further.

Testator by will, dated 16th April, 1779, appointed Edward Chapman and other executors, and gave them 30*l.* each; and delivered the will to E. C. telling him there was something in it for himself, that would reward him for the trouble he, the testator, had often given him, and for the extra trouble he would have in the execution of his will more than the other executors. With the will so delivered, there was pinned a piece of paper, or note directed to Mr. Edward Chapman, in which was inclosed a bank note value 50*l.* The testator frequently afterwards had the will, with the paper pinned thereto, and the contents returned to him, and as often again delivered the will and paper to E. C. At the time he last delivered the will to E. C., which was in November 1784, he said he thought he had not done enough for

* *Snellgrove v. Bailey*, 3 Atk. 214.

† 2 Vesey, 431.

him; and added, that he had doubled what was in the paper; and sometime after said to E. C. "Now I have made another will, the old will is of no use to me, but you must take care of it, by reason, you know, there is something with it for yourself: as soon as I am dead open the paper, and take it out." The last time the testator re-delivered the will to E. C. there was pinned to it a piece of paper directed, "For Mr. Chapman, 8th of November, 1784," and therein were contained two bank notes of 50*l.* each. — The testator by will, the 15th January, 1785, appointed E. C. one of his executors, to whom he gave legacies of 50*l.* each; E. C. also claimed 100*l.* — The master having reported the examination of E. C. and submitted it to the court, the principal matters of which are as abovementioned; it was argued that this is a gift before the making of the will; therefore the testator, if he meant the notes to pass, could have given them as a legacy; and it only appears from the evidence of Chapman. — Lord Chancellor. Being reported by the master, I think the gift good, as a *donatio causâ mortis** (35).

* *Hill v. Chapman*, 2 Bro. Cha. Rep. 612.

(35) To constitute a *donatio mortis causâ*, or gift in contemplation of death, the transaction must first possess the requisites of a gift. "By the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or an actual delivery of the thing to the donee." Per Abbott C. J. *Irons v. Smallpiece*, 2 Barn. & Ald. 552. *Hooper v. Goodwin*, 1 Swanst. 485. A *donatio mortis causâ* therefore requires delivery, and that delivery must be a full, complete, and actual delivery, where the subject matter of the gift is capable of actual transfer. A symbolical delivery is not sufficient. *Smith v. Smith*, 2 Stra. 955. *Blount v. Burrow*, 4 Bro. C. C. 72. *Tate v. Hilbert*, Ibid. 286. *Hawkins v. Blewitt*, 2 Esp. 663. *Shanley v. Harvey*, 2 Eden, 126. *Bunn v. Markham*, 7 Taunt. 224. S. C. 2 Marsh. 592. The delivery of a bond accompanied by expressions of gift will be available as a donation, because the bond constitutes the debt. *Snellgrove v. Bailey*, 3 Atk. 214. *Gardner v. Parker*, 3 Madd. 184. And where

A nuncupative or verbal will is, where the testator, without any writing, doth declare his will before a sufficient number of witnesses, and this can extend only to personal estate; for no real estate can pass by the will, unless it is written and attested in such manner as has lately been shewn. Those verbal wills were formerly more in use than at present, when the art of writing is become more universal; and as they are liable to great impositions, and may occasion many perjuries, the statute 29 Car. II. c. 3. enacts, 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him and approved; and unless the same be proved to have been so done by the oath of three witnesses at least, who by the statute of 3 & 5 Ann. c. 16. must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in anywise be good, where the estate bequeathed exceeds 30*l.* unless proved by three such witnesses present at the making thereof; and unless they or some of them were specially required to bear witness thereto by the testator himself (36): and unless it was made in his last sick-

a debt is secured by mortgage and bond, it seems that a delivery of the securities by the mortgagee to the mortgagor for the purpose of releasing or acquitting the debt, is an effectual donation *mortis causâ*. *Hurst v. Beach*, 5 Madd. 351. The peculiar inducement and circumstances of the gift annex to it certain qualifications, which may be in general comprehended within the description of the incidents of a legacy, to which the gift is analogous. It is revocable, therefore, by the donor, and revoked by the death of the donee during his life, and subject to the claims of creditors. *Smith v. Casen*, 1 P. Wms. 406. *Tate v. Hilbert*, 4 Bro. C. C. 293. 1 Ves. jun. 120.; but on the death of the donor the property vests absolutely in the donee; and no probate is required, nor is it the subject of ecclesiastical jurisdiction. *Ward v. Turner*, 2 Ves. 440. *Thompson v. Hodgson*, 2 Stra. 777.

(36) This branch of the statute is construed strictly, and it must clearly appear not only that the testamentary words

ness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least; except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days: nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow or next of kin to contest it if they think proper.

Hence we may perceive, this will extends only to personal estate: That the testamentary words by which it is to be made must be spoken with an intent to bequeath, not any loose idle words in the sick person's illness; for he must require the by-standers to bear witness of such his intention: That it must be made at home, or among his family or friends, unless by unavoidable accident, to prevent impositions from strangers; and it must be in his *last* sickness, for if he recovers he may alter his disposition, and has time to make a written will: That it must not be proved after six months from the making, unless it were put in writing within six days from that time; nor yet too hastily, as not until fourteen days after the testator's death, nor till legal notice hath been given to his widow, or next of kin.

The legislature have thus provided against any frauds in setting up nuncupative wills, by such a numerous train of requisites, that the thing itself has fallen into disuse, and hardly ever heard of, but in the only instance where favour ought to be shewn to it, when the testator is surprised by sudden and violent sickness*.

* 2 Black. Com. 501.

were spoken *animo testandi*, but that the words addressed to the witnesses did in effect desire them to bear witness. *Bennett v. Jackson*, 2 Phillim. 190.

CHAPTER III.

OF REVOKING THE WILL.

THAT a man may alter and make void his will at pleasure, and although he may have made his last will and testament irrevocable in the strongest words, he is at liberty to revoke it*, most people seem apprised of; but how a will may be revoked by acts in law and alteration of circumstances, very few persons have a just conception: and as many, after having made their will, have made alterations in their estate, and died without altering or republishing their will, and thereby left their estates and effects open to dispute and litigation; we shall here, after having attended to the statute 29 Car. II. point out various acts that may be done by a testator, so as to occasion either a total or partial revocation of his will; and then make some observations on the means whereby the revocation might be rectified, and on the nature and effect of a codicil, and the republication of a will; and conclude the head with shewing how, in various cases, a person may die both testate and intestate, and thereby part of his estate be disposed of by himself, and the other part by the law.

By statute 29 Car. II. c. 3. it is enacted that no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or by his directions in manner aforesaid, or unless the same be

* 8 Co. Rep. 82.

altered by some other will or codicil in writing, or other writing of the deviser signed in the presence of three or four witnesses declaring the same. And that no will in writing concerning any goods, chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of mouth only; except the same be in the lifetime of the testator committed to writing, and after the writing thereof read to the testator and allowed by him, and proved to be so done, by three witnesses at the least.

That a will may be effectual for passing lands, the same must be subscribed by three witnesses in the presence of the testator, as was shewn in the preceding chapter^b. So for revoking such a will within the words of the statute, it must be by a will attested by three witnesses, and subscribed by them in the presence of the testator^c (1).—A man makes his will duly executed and attested, and at the same time in like manner executes a duplicate thereof. Sometime after, having a mind to change one of his trustees, he orders his will to be written over again, without any variation whatsoever from the first, save only in the name of that trustee. And when it was so written over, he executes it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence. After this the

^b Page 203.

^c *Eccleston v. Speak*, Carth. 81.

(1) This position is not strictly correct, for the words "signed in the presence of three or four witnesses" contained in the 6th section of the 29 Car. 2. c. 3. have been holden to refer to the next preceding words "*other writing*" only, and not to the words "*will or codicil in writing*," and consequently it is not necessary that a will, whereby a former will is revoked merely, should be signed by the deviser in the presence of three witnesses. See *Hoil v. Clerk*, 3 Mod. 218. recognised by Lord Hardwicke in *Ellis v. Smith*, 4 Burn. Ecc. Law, 199. There does not appear to have been any case decided upon an instrument of revocation, intended merely to operate as such, and not as a devise.

testator cancels the duplicate, by tearing off the seal, and then dies. The question was, whether this second will not being good as a will to pass lands, should yet be a revocation of the first; and if it should not, whether the cancelling the other should be a revocation thereof within this statute. And it was decreed, that neither the making the second, nor the cancelling of the first, was a revocation thereof, though in the second there was an express clause that he did thereby revoke all former and other wills: wherein the Lord Chancellor took this distinction, that the second was not intended barely a revocation of the first, so as to signify his intention of dying intestate; but it was intended as an effectual will to pass the lands to the persons, and in the manner thereby devised; and therefore if it was not good as a will to that purpose, it was no revocation of the first^d (2).

Mr. Cox, commenting on the case just now cited, says, On the first head the act of cancelling was not sufficiently proved, but yet it is determined by this case as well as by *Burtenshaw v. Gilbert*, Cowp. 49. (which fully recognizes the principles of *Onions v. Tyrer*), that the cancelling is in

^d *Onions v. Tyrer*, 1 P. Will. 343.

(2) The law upon this subject was ably explained by Lord Chief Justice *Dallas*, in a late case, in which his Lordship thus expressed himself: "I take the rule to be, that where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled, in appearance, with his new testamentary act, that unless he completes such act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking. The true distinction, therefore, is, that where there is evidence of an intention to revoke, if that intention has not been completely carried into effect, the first will shall stand unrevoked, even though the dispositions of the second be ever so inconsistent with the former." *Winsor v. Pratt*, 5 B. Moore, 497.

itself an equivocal act, and, in order to operate as a revocation, must be done *animo revocandi* [with intention of revoking] (3). On the second head, with respect to revocation by subsequent devise, it is necessary that the second will should expressly revoke or be clearly incompatible with the first devise, *quoad* [as to] *the particular subject matter* of such devise, for no subsequent devise will revoke a prior one unless it apply to the same *subject matter*. *Hardwood v. Goodright*. It is also necessary that the second will should

(3) Therefore if the devisor were to throw the ink upon his will instead of the sand, although it might be a complete defacing of the instrument, it would not be a cancellation; or suppose a person having two wills of different dates by him, should direct the first will to be cancelled, and, through mistake, the person to whom the devisor gave his directions, should cancel the last will; such an act would not be a revocation of the last will: or suppose a person having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devise contained in such part. *Hyde v. Hyde*, 1 Eq. Ca. Abr. 409. S. C. 3 Cha. Rep. 155. However in order to effectuate a revocation by cancellation, it is not necessary that the will should be actually destroyed; hence, a slight tearing of a will, and throwing it on the fire, *with a deliberate intent to consume it*, by the testator, though it fell off and was preserved by a bystander without his consent or knowledge, has been holden to be a sufficient revocation. *Bibb d. Mole v. Thomas*, 2 Bl. 1043. But to operate a revocation the act of cancellation must be complete; for if a testator, conceiving the intention of cancelling his will, proceed to carry that intention into effect, but before his object is, in his own imagination, fully accomplished, he changes his purpose, the act not having been completed will not be sufficient to destroy the validity of the will. *Doe v. Perkes*, 3 Barn. & Ald. 489. In all these cases it is the intention which must govern, and parol evidence is admissible to explain it. Cowp. 53. If a will be destroyed during the lifetime of the testator, and without his knowledge, it will be substantiated upon satisfactory proof thereof and of its contents. *Trevelyan v. Trevelyan*, 1 Phillim. 149.

be *subsisting* and *effective* at the time of the death of the testator. If therefore it be not executed according to the statute of frauds, it is not *effective*, and it is as if no second will had existed, as in the present case of *Onions v. Tyrer*, (and yet a devise of lands void in respect to the *incapacity of the devisee* to take, shall revoke a former devise. So shall a subsequent grant to a *person incapable* of taking.) So, if the second will be effectively cancelled in the lifetime of the testator, the first will shall operate as if no other had existed, for it is the only will *subsisting* at the testator's death^e (4).

As concerning acts that may be done by a testator so as to occasion either a total or partial revocation of his will, it should be observed, that the above-mentioned statute has not taken away revocations of last wills by acts in law; as if the testator should afterwards make a feoffment or conveyance contrary to the will, or any other act inconsistent with it, but such revocations remain as they were before the making this statute^f; and an alteration of circumstances may be a revocation of a will notwithstanding this statute, which does not extend to implied revocations^g; as it hath been held, that, without an express revocation, if a man who hath made his will afterwards marries and has a child, this is a presumptive or implied revocation of his former will which he made in a state of celibacy^h. — From *Brady v. Cabbitt*, Doug. 30. (which collects the other cases upon this subject) it appears that no change in the situation of a testator can amount to more than a *presumptive* revocation of a devise of lands, and consequently that evidence is admissible

^e 1 P. Will. 345. n. 4th edit.

^h Gilbert on Wills, 99. 2 Black.

^f Carth. 81.

Com. 502.

^g 1 Eq. Cas. Abr. 413.

(4) But the particular circumstances of the cancellation and of the case must be attended to; for in a modern instance where a second will was mutilated so as to amount to a cancellation, such cancellation was held not to revive a prior will of nearly similar import. *Moore v. Moore*, 1 Phillim. 375. 406.

to rebut such presumption. — That a disposition of the *whole* estate will be *presumptively* revoked by a subsequent marriage and birth of a child. But quere, says Mr. Cox, Whether either of those circumstances *singly*, or only a *partial* disposition of the real property will raise the presumption¹ (5).

¹ 1 P. Will. 304. note 4. 4th edit.

(5) This head of revocation, originally borrowed from the civil law, (although by that law the doctrine stood upon a different footing, for it was the birth of issue alone that revoked, *Cicero de Oratore*, lib. i.) was formerly considered as grounded upon a presumed alteration of intention in the testator, but Lord *Kenyon* (*Doe v. Lancashire*, 5 T. R. 58.) has thought, and in which opinion Lord *Ellenborough* has concurred (*Kenebel v. Scrafton*, 2 East, 541.), that the rule is founded “on a tacit condition annexed to the will when “made, that it should not take effect if there should be a “total change in the situation of the testator’s family.” The change of circumstances may imply a change of intention; but the great circumstance which has been regarded as laying the foundation of this implied change of intention is the subsequent acquirement of new moral duties. But upon whatever grounds this rule of revocation may be supposed to stand, it has been solemnly determined that a subsequent marriage and the birth of a child, *without provision made for the objects of these relations*, is such a material change in the circumstances of the testator’s family, as will work a revocation of a devise of land. *Kenebel v. Scrafton*, *supra*. And in a case where, after making his will, the testator married, and his wife became pregnant with his knowledge, the posthumous child was considered for this purpose in the same condition as a child born during the testator’s lifetime. *Doe v. Lancashire*, *supra*. The rule, however, applies only to cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. Therefore if a testator by his will made before marriage specifically contemplates and provides for the persons who afterwards stand in the legal relation of wife and children to him, his subsequent marriage and the birth of children does not vacate his will. *Kenebel v. Scrafton*, *supra*. See also 1 Ves. & Bea. 465. So a will

With respect to real estate: By Lord Chancellor Hardwicke: The general principle is, that, at the time of the devise, the devisor must have a disposing capacity, and an estate in the land devised; and the estate must remain in the same plight and condition until his death: for the least alteration by any act of his makes it a different estate, and shews a different intention, and therefore is an actual revocation. Thus, if one seised in fee devises, then enfeoffs, or conveys it to another to the use of himself in fee; though it is the old use that remains, yet it is a revocation, notwithstanding it is his own feoffment or deed. So of a bargain and sale^k without enrolment. So if a man think himself

^k *A bargain and sale* is a conveyance made by deed, whereby real estate may be conveyed as well as by deed of feoffment or lease and release. Yet real estate will not pass by bargain and sale, unless the

made in favor of the children of a first marriage is not revoked by a subsequent marriage and the birth of children of such subsequent marriage, where the second wife and her children are provided for by a settlement. *Ex parte Earl of Ilchester*, 7 Ves. 348. And a devise of real estate in favor of a son and daughters of a first marriage will not be revoked by the subsequent marriage of the devisor and the birth of a child of that marriage, although the second wife and her child are unprovided for, because the only effect of such a revocation would be to let in the eldest son to the whole real estate. But in respect to personal estate the rule would be different. *Sheath v. York*, 1 Ves. & Bea. 390. See also *Hollway v. Clarke*, 1 Phillim. 339. *Emerson v. Boville*, Ib. 342. To raise this presumption of a revocation, it hath been laid down, that both the circumstances of a man's marriage and of the birth of a child must conspire; neither his subsequent marriage, nor the subsequent birth of a child, being of itself singly sufficient. *Doe v. Barford*, 4 Mau. & Selw. 10. Woodd. 373. 3 Wils. 516. And see 2 Fonbl. 350. note (b). But Sir John Nicholl, in a late most important case, after a luminous review of the principles and authorities upon which the doctrine of implied revocation stands, conceived that where there are corroboratory facts, shewing an intention to revoke, the subsequent birth of children may operate a revocation without the concurrence of a subsequent marriage. *Johnston v. Johnston*, 1 Phillim. 447.

tenant in fee, devises, and then, apprehending himself to be only tenant in tail, suffers a recovery with intent to confirm his will, it is a revocation (6). As to mortgages, they are ex-

deed be an indenture, and the same or with the *custos rotulorum* of the
 be inrolled within six months in one county, as directed by statute 27
 of the courts of Westminster-hall, Hen. VIII. c. 6.

(6) The doctrine of revocations of devises of freehold, on which the devise operates as a conveyance, proceeds not only on the words of the statute of wills, but on the nature of legal seisin, which changes with every change of the legal estate, and it was, as it should seem, originally introduced in favor of the heir. The rule is founded on this technical principle of law, that, in order to render a devise valid and effectual, it is necessary that the seisin of the devisor should remain unaltered from the execution of the will until his death. This species of revocation, or more accurately speaking, the ademption of the subject on which the will was designed to operate, is altogether independent of intention, and may prevail even in opposition to it. Therefore, where the whole estate is conveyed by lease and release to uses, although there be a resulting use in the ultimate reversion to the grantor by the same instrument, yet the conveyance will operate as a revocation of a prior will, because the grantor takes back his old use by a conveyance which purports to pass his whole estate. *Goodtitle v. Otway*, 1 Bos. & Pul. 576. See also 2 Swanst. 273. So if A, after making his will, suffer a recovery, *Doe v. Bishop of Llandaff*, 2 New Rep. 491.; or levy a fine, *Doe v. Dilnot*, Ib. 401.; the devise will be revoked, although the use result, or be limited to A himself. *Parsons v. Freeman*, 3 Atk. 741. So if A devise lands and afterwards makes a feoffment to the use of his will, 3 Atk. 804.; or if A covenant to levy a fine to the use of such person as he shall name by his will, then makes his will, and devises his land, and afterwards levies a fine in performance of his covenant, *Ambl.* 618.; or if A, seised in fee, devise an estate in fee to B, and by a conveyance takes back an estate from B in fee, 3 Atk. 742. 2 Ves. jun. 431.; all these cases amount to a revocation. So imperfect conveyances, though not capable to pass the estate, as a bargain and sale, without enrolment, or feoffment without livery of seisin, work a revocation. *Vawser v. Jeffery*, 2 Swanst. 274. And a devise of a freehold estate contracted for is revoked by a subsequent conveyance to the usual uses to bar dower.

ceptions out of the rule: at law a mortgage for years, and in equity a mortgage in fee, are revocations *pro tanto*, or for so much only; and the reason is, that a mortgage is only a security, and though it be a conveyance of real estate, yet in this court it is a chattel interest only, and goes to the executor, and it gives no dower¹. — Mortgages for terms of

¹ 5 New Abr. 527.

Rowlins v. Burges, 2 Ves. & Bea. 382. So a devise of a term is revoked by a purchase of the fee. *Capel v. Girdler*, Sugd. on Vendors, 158. And a devise of an estate is in equity revoked by a subsequent contract for the sale of it, *Ryder v. Wager*, and *Cotter v. Laver*, 2 P. Wms. 332. 623. *Vawser v. Jeffery*, 16 Ves. 519.; if the contract be of such a description as will entitle the vendee to a specific performance of it. Sugd. on Vend. 165. These are the necessary consequences flowing from the nature of a devise of lands. It is not an institution of an heir; it is in the nature of a conveyance; it is an appointment of the specific estate to be completed by a subsequent event, namely, the death of the deviser. The deviser must therefore continue to have it unaltered, and without any new modification, to the time of his death, when the devise is to take effect. If, therefore, any new disposition be made subsequently to the will, or in other words any new conveyance of that which had been conveyed by the will, it shall defeat the will. It implies an alteration, and the rule that the estate must pass by the first complete conveyance becomes applicable. Ambl. 618. 2 Ves. jun. 426. 3 Atk. 803. Cowp. 90. 305. On the principle that no alteration in the estate is effected, it has been held, that the mere partition of a joint estate does not operate a revocation, because it does not make any change in the seisin, and is incident to a joint estate. *Luther v. Kidby*, 8 Vin. Abr. 148. And if the owner of an unqualified equitable fee devise it, and afterwards takes an unqualified conveyance of the legal fee, this is no revocation of the will, because the conveyance is incident to the equitable fee. 3 P. Wms. 169. *Greenhill v. Greenhill*, 2 Vern. 679. But if he take a qualified conveyance of the legal fee, for the purpose of preventing dower, it is a revocation of the will, being a change in the quality of the estate, and not incident to the equitable fee. *Ward v. Moore*, 4 Madd. 368.

years on the death of the mortgagee, the term and the right in equity to receive the mortgage debt, vest in the same person, viz. the executor or administrator. But, in cases of mortgages in fee, the estate on the death of the mortgagee goes to the heir or devisee, and the money is payable to his executor or administrator^m, and must be paid by the heir, if he has the estate, as hath been shewnⁿ. — If lands are devised to one in fee, and afterwards mortgaged to the same devisee, it is a revocation *in toto*, or in the whole, being inconsistent with the devise; though if the land be mortgaged to a stranger, it is otherwise^o; for it hath been admitted to be a settled rule in chancery, that where a testator devises his lands in fee to one, and after mortgages it in fee to another, and then dies before the principal and interest is paid, this is not a *total* revocation of the will, but *quoad* the mortgage only, or as far as the mortgage, and the devisee shall have the equity of redemption^p (7).

^m Co. Litt. 205. note 1. 13th edit.

^o Prec. in Cha. 515.

ⁿ Page 62.

^p 1 Salk. 236. 258.

(7) This proceeds upon the principle that to defeat the disposition by the will, there must be a subsequent conveyance of the *whole* estate. It must be commensurate with the appointment which the will has made. If the inconsistency between the disposition by the will and the subsequent disposition be merely partial, the revocation will not extend beyond such inconsistency. As where A devises an absolute estate in fee to B, and afterwards by a subsequent devise gives him only an estate tail in the same land, it is a revocation merely to the extent of the difference between an estate tail and an estate in fee. Cowp. 90. So in the case of a conveyance for the payment of debts, the surplus resulting or being expressly reserved to the party making it, and his heirs, it is precisely the same case as that of a mortgage. There is no distinction between a general charge for debts, and a charge for a particular debt. The alteration of the estate in substance extends no farther than to let in the particular purpose; and whether definite for a particular debt, or indefinite for all debts, makes no difference. 2 Ves. jun. 428. See also *Williams v. Owen*, Ib. 595. *Cave v. Holford*. Ib. 603. But though a conveyance for a particular purpose

If a man devises land, and then makes a feoffment or conveyance of it, and afterwards repurchases it, yet the will stands revoked by the feoffment, and the repurchase is no declaration of the testator's mind to set it on foot again.^q — Although a covenant or articles do not at law revoke a will, yet, if entered into for a valuable consideration, amounting in equity to a conveyance, they must consequently be an equitable revocation of a will or any writing in nature thereof.^r — If a man devises land to J. S. and afterwards bargains and sells it to another, though this be not inrolled within six months, according to the statute, consequently nothing can pass to the bargainee, yet this is a revocation of the will; because here is a solemn act done, which plainly shews the intention of the testator to countermand the will.^s

If a man seised in fee devises to A B in fee, or for life, and afterwards makes a lease to C D for years, this even at law shall not be a revocation, but during the years: for the testator's intent does not appear further than during the term of years^t: and, where an husband was possessed of a term for forty years, devised it to his wife, and afterwards leased the same land to another for twenty years, and died; it was held that this lease was no revocation of the whole estate, but only during the twenty years, and that the wife should have the residue by the devise^u. So, if a man seised of lands devises the same in fee, or for life, and afterwards makes a lease thereof to another for years, it shall not be a revocation but during the years: though, in case a person has devised lands to one and his heirs, and afterwards leases

^q Gilb. on Wills. 101.

^t 1 Roll's Abr. 616.

^r 2 P. Will. 624.

^u *Ibid.*

^s Gilb. on Wills, 111.

will not operate beyond what the particular purpose requires, yet if the conveyance goes farther than what that purpose requires, it will be a revocation. Therefore, if a man in such a case conveys the *whole* of his estate, taking back an estate for life or giving an estate for life to another, that is a revocation. *Vawser v. Jeffery*, 2 Swanst. 273.

the same to him for a certain term, to commence after the devisors death, this is a revocation of the whole estate ^w.

Where a man was seized of a lease for three lives, which he devised, and afterwards surrendered the whole lease and took a new one to himself and his heirs for three lives, it was decreed by Lord Chancellor King, that this renewal of the lease was a revocation of the will, as to this particular ^x. So where a testator devised by his will a leasehold estate, which he held under *Magdalen College*, and after the making of his will, before his death renews his lease, by surrendering the old one, and taking a new lease, it was determined by the Lord Chancellor that this was a revocation of the devise ^y. And thus it hath lately been determined where a leasehold estate was specifically given and surrendered by the testator after having made his will ^z (8). And where testator held an

^w 1 Roll's Abr. 616.

^z *Hone and Medcraft*, 1 Bro. Cha.

^x 3 P. Will. 166. 170.

Rep. 261.

^y 2 Atk. 593, 5 New Abr. 527.

(8) The renewal of a lease for lives is always a revocation, because the renewed lease being a new purchase of a freehold estate, cannot pass by a will previously made. *Marwood v. Turner*, 3 P. Wms. 170. *Digby v. Legard*, 2 Dick. 500. *Abney v. Miller*, 2 Atk. 597. And in respect to a lease for years, if a testator simply bequeath a lease of which he is possessed at the making of his will, and afterwards renew that lease, the legatee is not entitled to the benefit of the new lease, for the new lease is not given to him, but the old lease only, which by the renewal is adeemed and gone. *James v. Dean*, 15 Ves. 238. But a testator may, if he please, in the case of a chattel lease, give not only the actual lease of which he is possessed at the making of his will, but such renewed or other lease of the same premises as he happens to be entitled to at the time of his death. In every case, therefore, where the lease has been renewed by the testator, after the making of his will, the true inquiry is, whether it appears from the context of the whole will to have been the testator's intention that the legatee should take, not merely the actual lease, if it subsisted at his death, but any renewed or other lease of the same premises which he might then happen to be possessed of. *Id. ibid.* *Colegrave v. Manby*, 6 Madd. 72.

estate for three lives, which he devised to his wife, and afterwards purchased the reversion in fee of the lifehold estate, the purchasing the fee was held a revocation, and the land thereby to descend upon the heir^a.

In case a fortune be given to a child by the father, subsequent to the making of his will, wherein he had bequeathed her a portion, this shall be taken as a revocation of the legacy and will for so much^b; as where a man by his will gave his four daughters 600*l.* a-piece, and afterwards married his eldest daughter to the plaintiff, and gave her 700*l.* portion. After that he makes a codicil, and gives 100*l.* a-piece to his unmarried daughters, and thereby *ratifies* and *confirms* his will, and dies. The plaintiff preferred his bill for the legacy of 600*l.* given to his wife by the will. It was held by the master of the rolls, that the portion given by the testator in his lifetime should be intended in satisfaction of the legacy. And it was agreed to be the constant rule of the court of chancery, that where a legacy was given to a child, who afterwards, upon marriage or otherwise, hath the like or greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent otherwise; and it was said the words of *ratifying* and *confirming* do not alter the case, though they amount to a new publication, being only words of form, and declaring nothing of the testator's intent in this matter^c.

A portion given after a legacy shall not be a satisfaction of it, where it is expressly given in satisfaction of a different claim; or where it is given absolutely, and the legacies under limitations. Neither can a legacy be a satisfaction for a claim *aliunde*, i. e. from some other person, unless clearly expressed to be so intended^d.

A parent paying a portion is presumed to mean to perform the gift of a legacy; unless there be a sufficient evidence to repel the presumption^e. As where a father gave a

^a *Galton v. Hancock*, 2 Atk. 424.

^b Prec. in Cha. 183.

^c *Irod and Hurst*, 2 Frem. Rep. 224.

^d *Baugh v. Reed*, 3 Bro. Cha. Rep. 192. (S. C. 1 Ves. jun. 257.)

^e *Ellison v. Cookson*, 2 Bro. Cha. Rep. 307.

sum to his daughter, by will, and afterwards gave an equal sum as a portion, it was presumed to be an ademption. In this case the Lord Chancellor said, the argument is, that the will is a distribution of the testator's property among his children; and if he advances the portion to a child, the *presumption of law* is, that the provision is satisfied. It is a presumption capable of being rebutted by evidence. With respect to the rule of law, I think, if neither the rule itself, or the mode of rebutting it had ever prevailed, it would have been as wise; but, as it is, I must admit that such a presumption exists; and though it is argued testators may not know it, yet I think, if there is such a presumption, the subject is bound to know it ^f.

Where a putative father gave a legacy of 1350*l.* to his daughter, and afterward, in his lifetime, gave 1000*l.* as a marriage portion; and after the marriage gave her and her husband 600*l.*, it was held not a satisfaction of the legacy, a declaration of the father's being proved by parolevidence that he intended a further provision. — The Lord Chancellor said, The old rule of satisfaction was a rigid one. If I am to believe the only witness produced, the testator in the second gift did not mean to perform the whole purpose, therefore every other act of bounty will stand clear, and advancements to any amount, unless marked with the intent of being the ultimate bounty, will stand unaffected. I do not rest on the witness referring to an intention in the father to do more at his death, but that the testator did not in the gift express any intention of satisfaction; therefore the gift by the will is not satisfied ^g.

There is a difference where a legacy and portion are given by a stranger, and where the same are given by a parent; as, where a legacy was given by a stranger to a female infant, the same was held not to be adeemed by his paying a marriage portion, and making other provisions for her and her husband, — Lord Chancellor. The word portion, although applied in the case of a parent, shall not be so applied to the gifts of other relations or friends: it has been determined

^f *Ellison v. Cookson*, 3 Bro. Cha. Rep. 63.

^g *Debene v. Man*, 2 Bro. Cha. Rep. 165. 519.

not to extend to a grandfather. Whatever foundation there might be for the original application of the rule, that the advancement of a parent shall not be a further gift, it is not now to be disputed: but it is obvious the intent of the testator is as often disappointed as served by it. Those cases stand on their own ground; this case is an attempt to make a friend's legacy satisfied by a subsequent advancement. There are cases where a man may describe himself so, that that the gift by the will, and that in his lifetime, may be intended for the same purpose, but it must appear that he meant to put himself *in loco parentis* [in the place of a parent]; for there are no cases where it has been so held; if the second gift appeared to be *diverso intuitu* [with a different view]. I have gone through all the cases, and it appears to be the result of them, that where a stranger gives a legacy by will, and afterwards gives a sum without any evidence that it is intended for the same purpose, it is not taken for a satisfaction; to make it so, it must appear, at the time of the gift, to be meant as an ademption of the legacy ^b (9).

^b *Powel v. Cleaver*, 2 Bro. Cha. Rep. 500.

(9 In general a person is entitled to the benefit of as many gifts as another chooses to bestow upon him, and a second is not a substitution of a first gift; but, as we have before seen, it is not so as to a debt. Judges in equity have also thought that a portion was in that respect like a debt, and accordingly have held that *prima facie* a portion to a child, by the will of the parent, if there be any other prior provision, is a satisfaction, unless it is shown clearly that it is not so intended. *Hinchliffe v. Hinchliffe*, 3 Ves. 516. And on the same principle a subsequent advancement has been held an ademption of a prior legacy. *Bellasis v. Uthwaite*, 1 Atk. 427. *Copley v. Copley*, 1 P. Wms. 147. *Byde v. Byde*, 2 Eden. 19. S.C. 1 Cox, 44. Nor will slight circumstances of difference between the provision by the settlement and that by the will alter the doctrine of satisfaction. *Pole v. Lord Somers*, 6 Ves. 309. But the doctrine resting entirely upon presumption, the portion given by the will, or the subsequent gift to operate either as a satisfaction of a prior provision, or an ademption of a prior legacy, must be *ejusdem*.

Cases wherein two legacies have been given by will to the same person, and he decreed to have only one, or both of them, have heretofore been mentioned, in treating on reconciling repugnant clauses¹. And that a legacy may be adeemed by testator's selling stock specifically bequeathed, is hereafter shewn in treating on specific legacies.

And thus having proceeded concerning how a will, after being made, may be revoked in whole or in part, we come now to make some observation on what might be done for rectifying the revocation; and as under some circumstances this might be effectuated by a codicil, and in some cases by

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generis, and equally beneficial to the child. Therefore land is not a satisfaction for money, nor is money for land. *Bengough v. Walker*, 15 Ves. 512. So a gift for the absolute benefit of the legatee is *prima facie* not an ademption of a legacy which gives only a qualified interest. *Thelluson v. Woodford*, 4 Madd. 420. And an advance to a legatee is not an ademption, if the nature of the gift is different from the legacy. *Bell v. Coleman*, 5 Madd. 22. Unless, indeed, the intent of the testator that they should so operate is manifest and expressly declared. *Id. ibid. Byde v. Byde*, *supra*. There is however this restriction imposed upon the generality of the rule, that to have the effect of satisfaction or of ademption the donor must be a parent, or a person acting as a parent, and discharging parental duty towards the legatee, for the rule is founded upon the artificial notion, that the parent is paying a debt of nature, and a sort of feeling upon what is called a bearing against double portions. A gift by a stranger to a legatee is not an ademption of a legacy given by such stranger to him, because a stranger is in general understood as giving a bounty, not as paying a debt; he must therefore be proved to mean it as a portion or provision, either upon the face of the will, or by evidence applying directly to the gift proposed by that will. 18 Ves. 153, 154. *Coop.* 281. And in this respect an advantage is given to illegitimate over legitimate children, for in the latter case a portion would be a satisfaction of a legacy; but it would not so operate in the former case. *Ex parte Dubost*, 18 Ves. 140. *Wetherby v. Dixon*, *Coop.* 279.

republishing the will, we shall now advert to and treat on those particulars.

A codicil is a schedule or supplement to a will, or an addition made by the testator annexed to and to be taken as part of a testament; being for its explanation or alteration, or to make some addition to, or subtraction from the former dispositions of the testator^k. An executor cannot regularly be appointed by a codicil, yet may be substituted, according to the will of the testator^l. A man may make divers codicils, and the first is of equal force with the last, if not contradictory to each other; and herein they differ entirely in their nature from wills, for no man can die with two testaments, because the latter doth always infringe the former, but a man may die with divers codicils, and the latter doth not hinder the former, unless they be contrary^m.

When a codicil is added to a will with intent to pass any real estate, care should be taken in using words sufficient, whether it be for altering former dispositions or disposing of estates purchased after the will was made; and the testator should execute the codicil in the same manner, and with the same number of witnesses, as is requisite to the executing an original will according to the statute. So, if a will concerns only personal estate, and a codicil is added with intent to make any alteration, subtraction, or addition, care ought to be taken in using words sufficient for the purpose. — Where there is time and opportunity for writing over the will afresh, and thereby to make such alteration as may be necessary, it is much more advisable so to do than to make alteration by a codicil, which will not only increase the expence of the probate when the will comes to be proved, but perhaps require as much, if not more nicety in framing than the will itself.

With respect to what will be a republication of a will of land, or real estate, by a codicil, under different circumstances, appears to have been a subject of much litigation; a variety of cases pertaining thereto are collected and discussed

^k Godolphin's O. L. p. 1. c. 1.
sect. 3..

^l Swinb. 14.
^m *Ibid.* 15.

in the case of the *Attorney General v. Downing* before the court of chancery in 1769^a. And in a case before the court, where the testator after having made his will renewed a prebendal lease, and some years after having purchased another prebendal lease, he made a codicil to his will, (which he declared was to be annexed to his will,) and thereby he gave the newly purchased estate to trustees, to the use of his daughter Mary for life, remainder to other uses. On the question, Whether the renewed lease was not an ademption of the bequest, and if so, whether the codicil was a republication of the will? It was argued, that, in the *Attorney General v. Downing*, it was decided that a will was republished by a codicil annexed to it, though the codicil related to subjects perfectly distinct from the will, and that a will of land would be republished by a codicil relating wholly to personalty, provided it was attested by three witnesses. — Lord Chancellor. The ground of Lord Camden's opinion in the *Attorney General v. Downing* was, that where the testator annexes a codicil to his will, he treats them as one instrument, and makes them so from that time. But, without entering into the question of republication of wills of lands, I think that in this case, where the testator speaks of a codicil to be annexed to his will he speaks again of his will, and, at least, in case of personal estate, it amounts to a republication^o (10).

^a Reported in Amb. Rep. 571.

^o *Coppin v. Fornyhouse*, 2 Bro. Cha. Rep. 291. The same point was agitated, and divers cases alluding

thereto cited, in arguing the case of *Powel v. Cleaver*. But nothing was said by Lord Chancellor thereon. *Ibid.* 511. 513.

(10) A codicil executed with the same solemnities which are required in order to render valid a devise of real estate, and which contains a general clause of confirmation of the will, or sufficiently indicates an intention that the will shall be deemed of the same date with the codicil, will have the effect of republishing a will of real estate, although the codicil relate merely to personal estate. *Gibson v. Lord Montfort*, 1 Ves. sen. 493. For where the will is republished by a codicil, the will and codicil are considered in point of

Where a man may have by him two or more wills, the latter, as above mentioned, overthrows the former; but the republication of a former will revokes one of a later date, and establishes the first again^P; so that what was before rendered void becomes valid by the new publication; and if there are words contained therein sufficient for passing or conveying such estate as the testator is possessed of at the time of the republication, to the person or persons for whom the same is designed, it may answer the purpose of making a new will; but if the words contained therein are insufficient, it will not be effectual; for the republication makes no alteration in the words of the will, and therefore can have no effect where the words are not sufficient to convey the estate to the person or persons for whom it is designed. — Where the will concerns real estate it is safe to republish it in a formal manner, as by the testator's taking it in his hand and declaring the same to be his last will, in the presence of three witnesses; and then to make a memorandum thereof in writing at the bottom of the will, or if there should not be room sufficient, then in the margin or on the back thereof, which may be as follows, *viz.*

^P 2 Black. Com. 502.

law as constituting but one instrument; and the operation given to the codicil is to bring down the will to the date of the codicil, making the will speak as of that date. *Acherley v. Vernon*, Com. 381. *Barnes v. Crowe*, 1 Ves. jun. 486. S. C. 4 Bro. C. C. 2. *Piggot v. Waller*, 7 Ves. 98. Therefore lands purchased after the date of the will, and before its re-execution, or before the date of the codicil, or lands contracted for before the date of the will, but conveyed between the dates of the will and codicil, will pass under the will, if the terms of the will are sufficiently comprehensive to include them. *Goodtitle v. Meredith*, 2 Mau. & Selw. 5. *Hulme v. Heygate*, 1 Meriv. 285. *Rowley v. Eyton*, 2 Meriv. 128. And an actual annexation of the codicil to the will is not essential to its republication. Toller on Executors, 30.

Whereas I John Mills, the testator named in this will, have republished the same, with an intent thereby to make void all and every other will and wills at any time heretofore by me made, and to confirm and establish this, which I have declared to be my last will and testament, in the presence of John Smith, Alice Smith, and Thomas Jones, who I have desired to subscribe their names as witnesses hereto: and in witness whereof I the said John Mills have hereunto subscribed my name this
 day of _____, in the year of our Lord 18

JOHN MILLS.

Signed by the said John Mills, in the presence of us, who, at his request, and in his presence, have subscribed our names as witnesses to the above republication.

JOHN SMITH.

ALICE SMITH.

THOMAS JONES.

If the will concern only personal estate, it will not be amiss to use the same formality for republishing it, though more slender evidence will be sufficient for the purpose. — As to bequests and testaments of personal estate, and a devise affecting real estate, there is this distinction. The former will operate upon whatever the testator dies possessed of, whether he had it at the time of making his will or the same was afterwards acquired. The latter will operate only upon such real estates as were the testator's at the time of executing and publishing his will; wherefore no real estate purchased afterwards will pass under such devise, unless subsequent to the purchase or contract the deviser republishes his will (11). So here, if a man having made his will, and thereby devised the whole of his estate and effects, and afterwards purchases any real estate, and dies, without

(11) See the observations of Lord Eldon in *Bland v. Lamb*, 2 Jac. & Walk. 405.

either republishing, or altering and re-executing his will, as directed by the statute heretofore often mentioned, he may die both testate and intestate, and his personal estate may be disposed of by himself, and his after-purchased real estate by the law, or will descend to his heir at law: which circumstance now leads us to shew, as was proposed, how in various cases a man may die both testate and intestate, and thereby part of his estate be disposed of by himself, and the other part by the law.

Those cases will be readily perceived, if we advert to what has been treated on under this and the next preceding head; as under the head of making the will it was shewn that, if the testator by his will gives his heir at law no other estate than the law entitles him to, he will take by descent and not by the will; so, if there are not words in the will sufficient for disinheriting the heir at law, or if there is a defect in executing the will, as in signing or witnessing it, whereby the same may be rendered invalid as to the real estate: and, if it be not in writing, but only nuncupative or verbal, which may be sufficient for the testator's goods and chattels. In those cases a man having real and personal estate, and having made his will and died, may be said to die both testate and intestate; intestate as to his real estate, which will descend to his heir at law in such manner as heretofore shewn^q, and testate as to his personal; for here he may have a will sufficient with respect to his goods and chattels. In like manner a man may die both testate and intestate where he has a will duly signed and witnessed, but has thereby disposed only of part of his real and personal estate, and not mentioned the rest, or devised the residue to any one; in which case part of his real estate will descend to his heir at law, and part of his personal be distributed in such manner as was heretofore shewn^r; unless it should devolve to the executor under such circumstances as have been mentioned^s.

Under this head of revoking the will, it may be perceived

^q Page 108—117.

^s Page 214.

^r Page 84.

that a man, after having made his will, may die either wholly intestate, or part testate and part intestate ; as where he revokes his will ; which revocation may arise from a variety of causes, and be either expressed or implied ; as if the testator cancels his will by tearing, obliterating, or burning it, which is an express revocation ; so where, after having made his will, he marries and has a child ; this is held a presumptive revocation ; and hereby, as well as by tearing, obliterating, or burning his will, he may die wholly intestate, both as to his real and personal estate. Likewise implied revocations are, where the estate devised is altered after making the will ; as in case the testator afterwards conveys the same to another, even though it may be re-conveyed to him, yet the conveying it is an implied revocation of his will, as to the estate conveyed by him. So, if a man possessed of a leasehold estate, and after having devised it surrenders his lease, and takes a new lease of his estate, this is an implied revocation of his will as to this particular, and if he dies before republishing it, he may die both testate and intestate ; testate as to that part of his will which is unrevoked, and intestate as to the part revoked ; so that one part of his estate may be disposed of by himself, and the other left to the disposition of the law. So it may be in respect to other cases that amount to implied revocations.

There is another kind of intestacy, which may be where a man may have made his will in writing pursuant to what is required by the statute of 29 Car. II. and thereby devised his real and personal estate, but hath not appointed any executor, either expressly, or by words whereby the making of an executor may be implied ; and in this case a man may also be said to die both testate and intestate ; testate as to his real estate, and intestate as to his personal : yet here the law has no concern with the disposal of either, administration being to be granted with the will annexed, which is to be the administrator's guide in disposing of the personal estate, in like manner as heretofore mentioned ; and as to the real

estate, an executor, as such, if appointed, has no concern therewith; neither is the appointment of an executor requisite where the will concerns only real estate, and has no concern with goods or chattels, nor ought it in such case to be proved in the spiritual court^u (12).

CHAPTER IV.

OF PROVING THE WILL.

UNDER this head we shall consider what an executor may do before the will is proved, and the reason why it should be proved. Whether it is prudent for the executor to take upon him the executorship, or to refuse it; the advantage that may accrue by taking upon him the executorship; his right to the surplus. The detriment or loss he may sustain by taking upon him the executorship; the effect of his joining with a co-executor in acquittance for money; in what cases executors shall pay interest for money. Then just take notice of the will, which concerns both real and personal estate, or personal estate only; and where and by whom the probate thereof is to be granted; and proceed to shew how the will may be proved in common form, or form of law, and the end and purpose of proving it either way. For proving it in common form; the power an executor has for compelling the ordinary to grant the probate, and what may obstruct his obtaining the same. — Cases

^u Cro. Car. 396.

(12) Therefore the probate of a will devising real property is not evidence of the contents of the will, even though the original is proved to be lost; the spiritual court having no power to authenticate such a devise as far as it relates to land. Bull. N. P. 245. *Doe v. Calvert*, 2 Campb. 389.

wherein administration must be granted with the will annexed, and the manner of thus granting it. — The method of proving a will in chancery. — That a will is to be registered if it concern real estate, or certain chattels real in the counties of York and Middlesex; and the manner and form of doing it. — In what court suits must be brought for proctors' fees, and the manner of taxing their bills.

Before letters of administration are issued, an administrator can do nothing, yet an executor may do many acts before he proves the will, as heretofore mentioned ^x; and the reason of this is, that an executor derives his power from the will and not from the probate; but the administrator owes his entirely to the appointment of an ordinary. An executor, before the will be proved, may seize and take into his hands any of the goods of the testator. He may pay debts, receive debts, make acquittances and releases of debts due to the testator, and take releases and acquittances of debts owing by the testator; and if before the will be proved, the day occur for payment upon bond made by or to the testator, payment must be made to or by the executor though no will be proved, upon the like pain of forfeiture as if the will were proved. Also, an executor may, before probate, sell or give away any of the goods or chattels of the testator ^y. And the executor, for goods of the testator taken from him, or a trespass done upon the lease land, or a distraining or impounding of goods or cattle, may maintain, before the will be proved, actions of distress, or replevin, or detainue; for these actions arise upon the executor's own possession. But before the proving of a will, an executor cannot maintain a suit or action of debt, or the like; and the reason is, for that therein he must shew forth the will, proved under the seal of the ordinary (1). And so it seems

^x Page 2.

^y Went. Off. Exec. 34, 35.

(1) An executor may *commence* an action, but he cannot *declare* before probate, since in order to assert a claim in his representative character, he must produce the copy of the

it must be, if he bring any action for trespass done, or goods taken in the testator's lifetime, so as the testator himself was entitled to the action, and it grows not upon the executor's possession, but upon the executor's own contract for the testator's goods; and if the executor sell cattle or other goods of the testator's before the will be proved, he may for the money payable maintain an action for debt before he hath proved any will; and in this, and the action of trespass, there is no necessity of naming him executor^a. In general, an executor is a complete executor before probate to all purposes but bringing of actions; so that he may release an action, assent to a legacy, may be sued, may alien, or otherwise intermeddle with the goods of the testator^a. For by administering (that is, if one do either pay debts of the testator, or receive debts, or make acquittances for them, or demand the testator's debts as executor, which are acts of administering^b, as will be more fully shewn hereafter), the executor hath accepted and taken upon him the whole administration before the probate; and is thereby entitled to receive the debts due to the testator; and all payments made to him are good, and shall not be defeated, although he should die and never prove the will^c.

The executor may, in convenient time after the testator's death, enter into the house descended to the heir, for the removing and taking away the goods, so as the door be open, or at least the key be in the door; and this seems to be understood of the door of each room. For, although the door

^a Went. Off. Exec. 36.

^a 1 Salk. 301.

^b Went. 41.

^c 1 Salk. 306, 307.

will certified under the seal of the spiritual court, or, as it is sometimes styled, the letters testamentary; but when produced they will have relation to the time of suing out the writ. Toller on Executors, 47. So before probate he may file a bill in equity, and it has been said to be sufficient if probate be obtained at any time before the hearing. *Patten v. Panton*, cited 3 Bac. Abr. 53.

of entrance into the hall and parlour be open, the executor cannot by that justify the breaking open the door of any chamber to take goods there; but only may take those in the rooms which be open. And this seems to be proved by the case of a chest with evidences; which it is said the executor may take, and put out the deeds, delivering them to the heir, that is to say, the chest being unlocked; though a chamber or other room within the house locked, is an enclosure of better respect than a chest. — If the goods be not removed within a convenient time, the heir may distrain them as damage feasant^d, that is, doing damage, and trespassing upon his land^e. In a case of trespass upon demurrer, which was, lessee for life of a house and pasture land dies, his executors suffer his cattle to go there for six days after his death, and then removed them; and in trespass justify for that time, averring, that in the time of six days they could not procure any other land or place to put in the cattle; whereupon it was demurred. And whether that were a convenient time to remove them, was the question. And the court seemed to incline, that six days is but a convenient time for the removing of their cattle; and the law allows a convenient time for their removing: especially it being averred they had not any other place to remove them unto. But for a fault in the plea wherein the defendant pleaded a lease of the house, but not of the land, as was mentioned in the declaration, it was adjudged for the plaintiff^f.

As the executor may receive debts, release debts, and do other acts before the will be proved; so on the other hand an executor may be sued for debts of the testator before the will be proved; unless he refuses the executorship in due manner, so as administration may be granted, and there may be somebody suable for the testator's debts^g.

By the statute 21 Hen. VIII. c. 5. the ordinary or other person having authority for probate of testaments, may convene before them persons named executors of any testament, to the intent to prove or refuse the same. And if the exe-

^d Went. Off. Exec. 92.

^e 3 Black. Com. 6.

^f Cro. Jac. 204.

^g Went. Off. Exec. 36.

cutors do not appear upon the process, the ordinary may excommunicate them: but they may pray time to advise, and the ordinary may grant in the mean time letters *ad colligendum bona defuncti*, that is, to gather up the goods of the deceased ^b.—Where a will is made and executors named, the ordinary, if he knows thereof, before he commits administration, must send out process against the executors to come in and prove it; and if they do not come, they are to be excommunicate; but if they do come, and none of them will prove, then by reason of such refusal, the ordinary may commit administration with the will annexed. Refusal must be by some act entered or recorded in the spiritual court, and not verbally or by word, and therefore must be done before some judge spiritual, and not before neighbours in the country; for that is not effectual¹.—After refusal, and administration committed, the executor cannot go back to prove the will and assume the executorship; but if only upon the executor's making default to come in upon the process to prove the will, the administration be committed, here the executor may at any time after come and prove the will, and so undo the administration ^b. If a man make an executor, but this is not known, or is concealed, the ordinary may grant administration until the will be proved¹. And if the person be disabled to be executor, or no executor at all be named in the will, the ordinary may grant administration ^m.—If administration be granted where there is a will and executors, although the will be concealed, the administration shall be void, if the will be produced and proved, as hath heretofore been shewn ⁿ.

^b Treatise on Eq. 109.

¹ Went. Off. Exec. 37. Swinb. 443.

^k Went. Off. Exec. 39.

¹ 1 Roll's Abr. 907.

^m Swinb. 380. For making an executor it is not always necessary that the word *executor* be expressed; but it is sufficient if the testator's meaning do appear by other words

of like sense or import; as if the testator say, I commit all my goods to the disposition of A B; or, I leave all my goods, or the residue of all my goods to A B or the like; for in these cases he to whom all the residue is bequeathed is thereby understood to be made executor. Swinb. 247.

ⁿ Page 59.

If there be but one executor, and he do refuse, or being many, and they do all refuse, then is the party dead intestate, and administration is to be committed with the will annexed, as has just been mentioned, and none after can meddle as executors^o. But where there are divers executors named in the will, and some of them do refuse, and others of them prove the testament, they who refuse may after, at their pleasure, administer, notwithstanding such refusal before the ordinary^p: as in case there be A, B, and C, and A only refuseth, and the will is proved by the others, there A continueth executor, notwithstanding his refusal; for the will being proved, all the executors therein named stand and continue executors notwithstanding any of their refusal^q; and they may pay debts, make releases, and they must be joined in all suits where the co-executors are plaintiffs; because they are all privy to the will, but not where they are defendants; because the plaintiff in the action is not bound by the law to take notice of any but those who have proved the will^r. — It is said that an executor who refused cannot administer after the death of his companion, and that then the executor of him who proved is only to administer; but, says Wentworth, that is not law, and the executor who had refused may afterwards administer at his pleasure^s. And thus it has been determined in the ecclesiastical court.

As to bringing of actions in the king's courts, the judges do not admit the executors to sue for things in action, if they shew not the testament duly proved under the seal of the ordinary; but always the king's courts have used to allow the probate of any of the executors to enable them all to bring actions; so that the probate of the testament doth not give them any interest or title to the things in action or possession, for they have their title and interest by the testament, and not by the probate; and yet without probate the

^o Went. Off. Exec. 41. 9 Co. Rep. 37. 3 P. Will. 251.

^p Bacon's Use of the Law, 161.

^q Went. Off. Exec. 42.

^r Swinb. 444.

^s Office of Exec. 42.

judges will not allow them to bring actions^t as executors.

—Where there be two executors, and one of them proveth the will in the name of both against the will of the other; this is not any administration for him who consenteth not to the probate; but he may plead that he never was executor; for the probate maketh him not executor, if he doth not administer^v.

If there be two executors made, and one of them doth refuse before the ordinary, and the other doth prove the will, and make a will himself, and appoint an executor, and then die; in this case it is said, the executor of the executor who proved the will alone, shall have the disposition of all the estate and be executor to the first testator; and that the surviving executor shall not meddle therewith; for that his election by the death of his companion is gone^w. But it has been determined otherwise in the ecclesiastical court, and that a surviving executor who had refused may retract, and come and take probate in preference to the executor of the executor who proved the will^x (2). And it is the practice of the ecclesiastical court that, in case such surviving executor shall not, after the death of the executor who proved, retract and take probate, to grant administration *de bonis non* of the testator to his residuary legatee.

If an executor die after he hath proved the will, and hath by his will appointed an executor, in case there was but one executor, this executor also shall be executor to the first testator, as he is to the second; and he shall have all the benefit, and be subject to all the charge, that the first testator had and was subject unto; and yet the goods of one testator shall not be subject to the debts of the other, but each of the testator's goods shall be subject to the payment of his own debts only. And if in this case, the executor of the

^t 9 Co. Rep. 38.

^v 1 Roll's Abr. 918.

^w Dyer, 160. Shep. Touch. 445.
4th edit.

^x *Price v. Price*, after Hil. Term, 1764.

(2) See *Cottle v. Aldrich*, 4 Mau. & Selw. 175.

executor take upon him the administration of the goods of the first testator, he cannot refuse the administration of the goods of the latter ; yet he may take upon him the latter and refuse the former. But if the executor refuse to administer to the first testator before the ordinary, or die before probate of the will, and he hath made a testament, and appointed an executor therein ; in these cases, it seems the executor of the executor shall not administer the goods of the first testator, but the ordinary must grant administration thereof ; and yet if all the residue of the goods of the first testator be given by the testament to the first executor after the debts be paid ; in this case, although he die before probate of the will, yet his executor shall be executor also to the first testator, or else he shall have the administration of his goods and chattels granted unto him ^v.

In all cases, except in special trust or authority, without the office of executorship, the executor of an executor stands, as to the points both of being, having, and doing, in the same state and plight as the first and immediate executor^a. But if two be appointed executors, and the one makes his testament, wherein he names his executor, and dies, his co-executor surviving ; in this case, the executor of the executor is not to be joined with the executor surviving ; neither in the execution of the will, nor in suits or actions. And if the executor of the executor have any goods or chattels in his hands which did belong to the first testator, the executor of the same testator surviving may have an action against the executor of the executor of the same ; for the power of the executor who died first was determined by his death, the other then surviving^a. So, where there are two administrators, and one dies, the administration survives, as heretofore shewn ^b. — Where two executors are made, the one making a will and executors, and dying, if the other die after intestate ; the executor of him who first died shall not be executor to the first testator, as he is dead intestate ; because the surviving executor is so dead, and in him the executor-

^v Shep. Touch. 445. 4th edit.

^a Went. Off. Exec. 259.

^a Swinb. 324, 325.

^b Page 7. 24.

ship was wholly and solely settled by the death of his fellow before him ; and in this case administration of goods not administered, or *de bonis non administratis*, as it is usually termed, shall be committed^c.

The interest vested in the executor may be continued and kept alive by the will of the same executor ; so that the executor of A's executor, is to all intents and purposes the executor and representative of A himself ; but the executor of A's administrator, or the administrator of A's executor, is not the representative of A. For the power of an executor is founded upon the special confidence and actual appointment of the deceased ; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence ; but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all ; and therefore, on the death of that officer, it results back to the ordinary to appoint another, or to commit a new administration, as hath heretofore been mentioned^d. So that in these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, of the goods of the deceased not administered by the former executor or administrator^e.

The probate of the will, as having respect to goods and chattels, is in some respects necessary ; but touching any freehold of lands devised, it is not at all material. As to goods and chattels, although the executor before probate may receive and release debts, he cannot sue for any debts due to the testator^f, neither can an executor or other person give a will in evidence concerning a personal chattel without producing the probate ; for this will is no will, until it has received a sanction or an allowance of it in the spiritual court ; for they are to judge whether it be a will or not ; and the temporal courts are not to look upon it as a will till probate be made. And in an action of trover for goods

^c Went. Off. Exec. 101.

^d Page 7.

^e 2 Black. Com. 506.

^f Co. Litt. 292.

which a testator gave to his sister in his lifetime, brought against the executor for them, who would have given in evidence a former will to have shewn that he had no power to give those goods; this was refused, because he ought to have produced the probates.

Hence we may form an idea of what an executor may do before the will is proved, and hereby and by what will hereafter be shewn with respect to proving in common form, or form of law, the reasons why it should be proved may be perceived. And now we may consider whether it is prudent for the executor to take upon him the executorship, or to refuse it; and here we may first examine by what means he may make himself liable thereunto, and how far he may meddle with the testator's estate without subjecting himself thereto; and then what profit or advantage may accrue to him, and what detriment or loss he may sustain thereby.

He that is named executor cannot be compelled to stand to the will and undertake the executorship, unless he hath already meddled with the goods of the testator *as executor*; and whereby he is not only to be compelled to perform the office of an executor, but also if he should refuse, and the ordinary commit administration unto him, this refusal is void, and he shall be charged as executor^b. So that if the executor named in the testament resolves not to stand to the executorship, but to refuse the same, he should not administer the goods of the deceased *as executor*; for having once administered *as executor*, he may at any time after be compelled to undergo the burden of an executor, and also may be sued as executor by the creditors of the testator, though he cannot sue others as executor; for that he hath not the will under the ordinary's seal.

A person is then said to administer as executor, so as thereby he may be compelled to stand to the executorship, when he performs those acts which are proper to an executor; as to pay the debts due by the testator, or to receive any debts due unto the testator or to give acquittances for

^a Viner's Abr. Executor, A. a. 20.

^b Swinb. 384.

the same¹, or demand the testator's debts as executor: all these be full and clear administrations as executor. And if one, being sued as executor, take it upon him and plead in bar as executor, this is an administration: The common plea to free himself, and to shew that he is not the party suable for the testator's debt, being, that he neither is executor, nor ever did administer as executor^k. If a man do those acts which are not proper to an executor, he is not said to have administered as executor, to the effect before-mentioned; as to feed the cattle of the deceased, lest they should perish, or take into his custody the goods of the deceased, to the end they may be safe from being stolen or purloined, or to dispose of the testator's goods about the funeral (3), for these be deeds of charity common to every christian, and not peculiar to an executor. Likewise to make an inventory of the goods of the deceased, is not to administer as an executor, or to deliver to the wife her convenient apparel^l.

As to the profit or advantage that may accrue to an executor by taking upon him the executorship, we may observe that, although a person hath not meddled with the goods of the testator, and is therefore not compellable, yet, if a legacy be left to him, he may be compelled to stand to the executorship, or else lose his legacy^m. — Where the testator gave legacies to certain persons by the description of "his very good friends," and in the further part of the will, desired them "to act as executors." *Smith*, one of the persons, by his answer, said that he had not proved the will, or acted as executor, but claimed his legacy. His honour the master of the rolls, said, an executor, so appointed, could

¹ Swinb. 469.

^k Went. Off. Exec. 41.

^l Swinb. 471, 472.

^m Gibson, 469.

(3) In case of necessity, a stranger may direct the funeral and defray the expense out of the deceased's effects, without rendering himself liable as executor *de son tort*. Vin. Abr. Executor, B. a. 24. See also *Tugwell v. Hayman*, 2 Campb. 298.

not claim his legacy without acting, or, at least, proving the will" (4).

Formerly it was a settled notion, if there was no residuary legatee appointed by the will, the surplus or *residuum* devolved to the executors' own use, by virtue of the executorship; but now there is this restriction, that although where the executor has no legacy at all, the *residuum* shall in general be his own; yet, where there is a sufficiency on the face of the will, (by means of a competent legacy, or otherwise,) to imply that the testator intended his executor should not have the residue, the undivided surplus of the estate shall go to the next of kin; and if there be no kindred then to the crown.

And where unequal legacies have been given to executors,

^a *Read v. Dovey*, 3 Bro. Cha. Rep. 95. (S. C. 2 Cox, 285.)

(4) There is a report of what passed upon this cause, coming on upon further directions, 2 Cox, 285. *Smith*, in his answer, had stated, that he had not proved the will, nor ever meant to prove it. But between the hearing and setting down the cause for further directions he did prove it. His honor now thought, that he had sufficiently entitled himself; and that the mere saying he never meant to prove the will, was not a sufficient refusal to act, while there was another executor acting. The general doctrine is clearly settled, that if a legacy is given to a man as executor, whether expressed to be for care and trouble or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor, and either act or distinctly shew his intention to act. *Abbott v. Massie*, 3 Ves. 148. *Harrison v. Rowley*, 4 Ves. 216. *Andrew v. Trinity Hall*, 9 Ves. 534. *Stackpole v. Howell*, 13 Ves. 417. *Freeman v. Fairlie*, 3 Meriv. 31. For although an executor proves the will, yet if he does not appear to have done it with an intention of really acting in the execution of it, he is not entitled to his legacy. *Harford v. Browning*, 1 Cox, 302. But where there is not a refusal or a neglect to act, and the legacy is made payable at a time before which the interference of the executor is unnecessary, he may claim the legacy notwithstanding he afterwards declines to accept the trust. *Brydges v. Wotton*, 1 Ves. & Bea. 134.

and the surplus or *residuum* of the testator's estate undisposed of, the same hath been judged to devolve to the executors, by virtue of their executorship, upon the principle just mentioned; as that there hath not appeared a sufficiency on the face of the will to imply that the testator's intention was otherwise; and upon this principle the court of chancery determined in favour of the executors, in the case of *Bowker* and *Hunter* lately before the court, and which was as follows: *Frances Bayley* being possessed of a considerable personal estate, 31st January, 1777, made her will, and thereby gave to *Thomas Vicars Hunter*, gent. the sum of 200*l.* and, after a great many legacies to a variety of persons, among whom were *some* of her next of kin; she gave the Rev. *James Eaton* the sum of 50*l.* and after some charitable legacies, she appointed the said *Thomas Vicars Hunter* and *James Eaton*, executors; but made no disposition of the residue. The executors having proved the will, the next of kin filed a bill in the court of chancery, for an account of the residue of the testatrix's estate, and praying, that the executors having legacies, it might be distributed. The defendants (the executors) admitted assets more than sufficient to pay debts, legacies, and funeral expences; but insisted they had a right to the personal estate, there being nothing inconsistent with such right in the will, or indicative of a contrary intention; the legacies not being given to them as executors, but by their proper names, and there being a great inequality between them, by which the testatrix shewed she meant to dispose of the whole, and not to die intestate as to any part thereof. — This cause being argued, and a variety of cases cited by the counsel on each side. By the Lord Chancellor in his discussion thereof: Here the testator's intention is declared in more slender words than in any of the other cases. When the testator gives the executor part by express words, and in the same manner as he appoints him executor, it shews his intention to be different from that expressed by the fact of making him executor. In order to make a gift of part a bar to taking the residue, the general gift must make the intent as clear as the other

intention is from making him executor; where it will bear another intent, it will not bar him from taking the residue. The fundamental distinction is established by laying it down that the rule, *that the executor shall take the residue*, must prevail, unless there is an irresistible inference to the contrary. If the gift of the legacy is qualified, it is sufficient to prevent its barring the residue, or if it may be given for a different purpose. The gift of unequal legacies may have a different ground from the gift of the whole; it may in many events be different: for instance, if 100*l.* be given to one, and 50*l.* to the other, it may be different; in case of deficiency, from giving the one 50*l.* the other nothing. The implication is, that the testatrix must have had a different intent, and that must rebut the equity; and therefore the bill must be dismissed; whereby the executors have the residue. — Upon a re-hearing of this cause before the lords commissioners, before whom it was argued very fully; Lord Loughborough citing all the cases pertinent to the point; in delivering the opinion of the court his Lordship said, The cases, such as they are, are in favour of the executors. I think the safer proceeding will be, to affirm Lord Thurlow's decree, which will throw this case into the line of those determinations which have proceeded on the distinction; without overthrowing those where a legacy is given simply to an executor^r.

By law the appointment of an executor vests in him all the personal estate of the testator not otherwise disposed of⁽⁵⁾; but wherever courts of equity have seen on the face of the will sufficient to convince them that the testator did not intend the executor to take the surplus, they have turned the executors into trustees for those on whom the law would cast the surplus in case of a complete intestacy, *i. e.* the next of kin; as where the executors are expressly called exe-

^r *Bowker & Hunter*, 1 Bro. Cha. Rep. 328. ^r *Ibid.* 334.

(5) See *Bland v. Lamb*, 2 Jac. & Walk. 210.

cutors *in trust*, or where any other expressions occur, shewing the *office* only to be intended them, and not the beneficial interest (6). And a pecuniary legacy given to a sole executor affords sufficient argument to exclude him from the residue, as it is absurd to suppose a testator to give expressly a *part* of the fund to the person he intended to take the *whole*. And it is settled that the wife being the executrix shall make no difference. So *equal pecuniary* legacies to two or more executors shall exclude them from the surplus (7). But where the legacy is *consistent* with the intent that the executor should take the whole, a court of equity will not disturb his legal right : and therefore where

(6) Where the testator appointed the *American* ambassador his executor, or such other person as should be the *American* ambassador at the time of his death, Sir *William Grant* held that to be a circumstance connected with others indicative of an intention to confer upon him the office only, he being appointed not in his individual character and as a friend, but in the capacity of minister. *Urquhart v. King*, 7 Ves. 230. See also *Griffiths v. Hamilton*, 12 Ves. 309. So where the testator has begun to make a disposition of the surplus, but has not proceeded to complete it, there also the executor shall be excluded. As where a residuary clause is inserted in the will, and the testator has omitted to name the residuary legatee. 1 P. Wms. 550. n. 2 Ves. sen. 91. 495. 2 Ves. jun. 78. 4 Ves. 117. *Giraud v. Hanbury*, 3 Meriv. 150. And a bequest that the whole of the testator's property shall pass by his codicil *according to law*, will exclude the executor, and make him a trustee for the next of kin. 14 Ves. 307. But a blank space between the last line in a will and the signature raises no presumption of an intention to dispose of the residue against the legal right of the executor, *White v. Williams*, 9 Ves. & Bea. 72. S. C. Coop. 58.

(7) See *Bull v. Kingston*, 1 Meriv. 314. *Southouse v. Bate*, 2 Ves. & Bea. 396. *King v. Denison*, 1 Ves. & Bea. 277. Where a testator has given his executors legacies expressly for their care and trouble, it is sufficient to exclude them from taking the residue. *Langham v. Sandford*, 17 Ves. 435. S. C. 2 Meriv. 6. *Gibbs v. Rumsey*, 2 Ves. & Bea. 294.

the gift to the executor is only an *exception out* of another legacy, it shall not exclude him from the residue, because it is necessary to make such exception expressly. So, a legacy to one only of two or more executors shall exclude neither from the surplus, because the testator might intend to such one a preference (8). The same rule and reason hold, where several executors have *unequal* pecuniary legacies^a.

As to *specific legacies*, it is determined that a *specific* legacy will exclude a sole executor, and also that *specific* legacies of *unequal* value to several executors shall not exclude them. — Of parol evidence being admitted in cases of this nature, mention was made in a former chapter^c (9).

And now we shall proceed to relate some very late determined cases, alluding to the above-mentioned points; as, that where the residue was given to a person who died in the life of the testator, by which the gift lapsed, and the executors, though they had no legacies, were held to be trustees for the next of kin. — The gift was to Jenny Powell, who died in the lifetime of the testator, by which the bequest to her lapsed; and the next of kin of the testator filed the bill against the executors, for the residue; insisting that, the residue having been given, they were executors in trust only. — Lord Chancellor. I take it to be clear, that though executors take beneficially, as well as nominally, where there is nothing in the will to the contrary; yet if there is any thing to shew an intent that they were intended as trustees, it will make them so. And wherever the testator has, by the same instrument by which he appoints them executors, given every thing away from them to a stranger, that must shew he meant them only to take as trustees. Here

^a 1 P. Will. 550. note 1. 4th ed. ^c Page 191. n.

(8) And it makes no difference whether the legacy be given by will or by a codicil. 14 Ves. 193.

(9) See on this subject, Toller on Executors, 355.

he meant Jenny Powell to take beneficially; and if she had come to claim, there could have been no doubt ^u (10).

The testator gave the rest and residue of real and personal estates to be sold by trustees, and to pay annuities, and then to pay the produce to A for life; and made no further disposition. One of the trustees (who were executors) had a legacy. — It was held that, this does not give the executors a beneficial interest; and that so much of the residue as arose from the real estate, is a resulting trust for the heir, the rest a trust for the next of kin ^x.

A bequest was of residue to certain persons equally to be divided between them, share and share alike, and the testatrix directed, that *in case of the death of any of them* (the said residuary legatees) *before her, then the share or shares of him, her, or them, so dying before her, should go to, be had and received,* by his or her legal representatives. — One of the legatees, named John Webb, died in testatrix's lifetime, possessed of considerable personal estate, and made his will, whereby he gave several legacies to the plaintiffs and defendants in this cause, and appointed two of the defendants executors, leaving the plaintiffs and some of the defendants his residuary legatees. After the testatrix's death, 2,235*l.* 19*s.* was paid by the executor of the testatrix to the executor of John Webb, as his share of the residue of her estate; and different claims being made hereof, it was held the next of kin of John Webb shall take it, not his executor beneficially, or his residuary legatees ^y (11).

^u *Bennet v. Batchelor*, 3 Bro. Cha. Rep. 30.

^y *Bridge v. Abbot*, 3 Bro. Cha. Rep. 224.

^x *Robinson v. Taylor*, 2 Bro. Cha. Rep. 589.

(10) Upon the same principle, if the residue be attempted to be disposed of by an imperfect bequest, the attempt to devise will be effectual to exclude the executors from it. *Bishop of Cloyne v. Young*, 2 Ves. sen. 91.

(11) The extension of a devise or legacy to heirs or executors will not prevent the devise or legacy lapsing. *Smith v. Pybus*, 9 Ves. 576. The former point has been decided

lawfully take money to present^b.— By what has been mentioned towards the beginning of this chapter, and in the second section of the second chapter of the Law's Disposal, the power an executor has by virtue of his executorship may be perceived; and in the third section the particulars of what he is interested in^c: and, under a subsequent head, we shall treat on the time an executor has for paying legacies.

And here we may observe that the executor shall be allowed all reasonable expences, as well in law-suits, as for other honest purposes; and this reasonableness of expences to be such, as that he may receive thereby neither profit nor loss. And that one executor shall not be charged with the wrong or devastavit of his companion, and shall be not farther liable than for the assets that came to his hands; and therefore where an action was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets, to the amount of 6000*l*. and died, and that only 16*l*. came to the hands of the two others; the court held that they should be charged for no more than the 16*l*., for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the other executors^d. And where an executor or administrator puts out money upon a real security, which at that time there was no reason to object to, and afterwards such security proves bad, he shall not be accountable for the loss^e.

The danger of an executor's sustaining detriment or loss by taking upon him the executorship, will chiefly arise from the insufficiency of the testator's goods and chattels for satisfying debts and legacies; especially if he is not careful in observing the rules and order for paying the same.

^b Went. Off. Exec. 73.

^c Page 25—33.

^d Bac. Abr. 395. The rule at law is, where one executor takes the testator's money, but of his own authority, his companion shall not be charged; but otherwise it is if he

by any act, which shews he had it in his power to secure the money, puts it in the hands of his companion. A demonstration whereof will be seen in the ensuing pages.

^e 1 P. Will. 141.

When the testator's goods and chattels are not sufficient to pay his debts and legacies, there are divers ways whereby an executor may endanger his own estate, and subject the same to answer damages ; as, 1. When he bestows more upon the funeral of the deceased than is meet, and for which a very small sum seems to be allowed against creditors, as we have heretofore seen^f : 2. When he pays legacies in money, or assents to legacies before the debts are paid, and hath not enough besides to pay the debts : 3. When he doth not pay the debts in that order and manner as herein before shewn^g, but pays them first that he should pay last, and he hath not enough to pay them all. 4. When he doth release a debt or duty due to the deceased before he receives it ; or when the goods of the deceased being taken from him, he releases to him that takes them the action whereby he might have recovered them : 5. When he sells the goods of the deceased much under value, especially if it be with covin ; as, to his near friends, to his own use, to have money under hand, or the like ; but otherwise to sell them under value, especially when he cannot conveniently make more of them, is no waste. All those, and such like acts as these, are said to be a waste in an executor or administrator ; and being discovered against him by return of the sheriff, it will produce this effect, to make the executor or administrator chargeable for so much as he hath misemployed and wasted *de bonis propriis*, i. e. of his own proper goods : so that any creditor may charge him for the debt due to him from the testator, as for his own proper debt, and for so much the execution shall be made against him upon his own body, lands, and goods ; and yet so as one executor or administrator shall not be charged for the waste of another : for if there be many executors, and one of them only doth commit the waste, he only shall be punished for the waste^h. But where two executors join in an acquittance, but only one receives the money, both are chargeable for itⁱ.

And where the testator gave the residue of his personal

^f Page 66.

^g Page 66—80.

^h Shep. Touch. 4th edit. 463, 464.
Salk. 318.

estate to W. R. and S. D. his executors, after-named, in trust for the residuary legatee, with a clause contained in his will, that his executors should not be liable for the acts of each other. The executors drew joint draughts for 500*l.* and 2000*l.* of their testator, which remained in the hands of W. R. seven years, when he became a bankrupt. S. D. had never acted in the execution of the will (although he had proved it) except by drawing the two bills of exchange, W. R. being the sole acting executor. — On the question, Whether S. D. having joined in drawing the two bills of exchange, became thereby answerable to the legatee in respect of that money, although he had never received any part thereof? He was held to be answerable for one moiety of the 7000*l.* — To this the defendant excepted, and the exceptions being argued,

Lord Chancellor said, I take it to be clear, that where, by any act, or any agreement of the one party, money gets into the hands of his companion, whether co-trustee or co-executor, they shall both be answerable. — So in the case of a perfect stranger, if the trustee clothes that stranger with the power of receiving the money, they shall both be answerable. — Where one executor takes the money but of his own authority, his companion shall not be charged; but if he puts the money into the hands of his companion, he shews he had it in his power to secure it; and that his companion, for some reason, was permitted to obtain the possession of the money. — It was decided by as able judges as ever presided, upon principles of law, as well as upon principles of discretion, that a trustee, joining in the receipt, should be charged with the fund; because he appeared to have a power over the fund. — If the rule of law had remained so to this day, the wisdom of it might have been discussed in subsequent cases, as *Heaton v. Marriot*, *Fellows v. Mitchell*, (1 Wms. 81.) It has been determined, that where two trustees join in receipts or conveyances, and the one only receives the money, that party shall be solely liable, as the other joined purely for the sake of conformity. But, in the

case of executors, the rule of law prevailed, and both have been deemed liable. — In a later case, 3 Atk. 484. *Leigh & Barry*, the rule is confirmed, that trustees shall not be chargeable, but that executors shall, under such circumstances as the present.

In the present case, the circumstances are very strong to induce me to adhere to the old rule. The party suffered the money to be out a long time in the hands of a tradesman, and neglected to call it in, notwithstanding the party interested in the fund was an infant: in such case as this he is clearly chargeable^{*}.

In a case determined by that we have just now cited, the testatrix being entitled to 500*l.* secured upon mortgage, by will directed her executors to permit S. and her assigns, to take the interest arising from the said mortgage during life; and, if the said mortgage should be paid off, she directed the money to be laid out in government securities to the same use, and after the death of S. gave the principal sum to two other persons, and appointed Joseph Barnardiston and Samuel Howes executors. — The mortgage money was paid to Howes, who became insolvent. — Barnardiston joining in the conveyance to the mortgagor, signing the receipt, and afterwards neglecting to have the money laid out according to the directions of the will, the question was, Whether this will did not make Barnardiston liable?

The Master of the Rolls said, It was contended that it was the rule, that executors joining in a receipt, are both liable. To that I enter my dissent: for I do not hold that an executor cannot, in any case, be discharged from a receipt given for conformity. I do not find fault with the case of *Westley v. Clarke*, 1 Wms. 88. n.: but this case proceeds on a different ground. The cases on the subject are all collected in that of *Sadler v. Hobbs*; and that case must govern, it being a weaker case than this. — Till *Westley v. Clarke*, there is no case where an executor joining in a receipt has

^{*} *Sadler v. Hobbs*, 2 Bro. Cha. Rep. 114.

not been held liable.—In *Murrel v. Pitt*, 2 Vern. 570. 21 Viner, 534. the plaintiffs were residuary legatees, and brought their bill against executors who had joined in a transfer of stock, and divided the money between them: one had become insolvent, and it was held the other was liable for the whole, because it was a voluntary act. And, in that case, the executors were merely in the case of trustees, as the Bank will not admit a transfer but by all the executors. I should be sorry, in such a case, to determine that a man should be bound by the act of his co-executor.—The case of *Sadler v. Hobbs* must determine the present case.—To the opinion given in that case I subscribe. It does not appear in that case what the trust was. Here it was to lay the money out in the public funds; it was not money wanted to pay debts, and left in the hands of the trustee for that purpose. Perhaps in a court of law the signing the receipt would be conclusive evidence of receiving the money: I think it is not so in a court of equity. But, in this case, Barnardiston was the first in making the conveyance and in the receipt; and intermeddled as an acting party; I therefore think his estate liable¹.

One executor shall not be answerable for the sums come to the hands of another, unless they have done joint acts. And with respect to interest which executors may be liable to pay, whereof further mention is made in a subsequent part of our work, in treating on interest due on debts. If an executor keep the money of his testator longer than the exigencies of the testator's affairs require, he shall pay interest; and if the money be sued for, the costs; and so if there be two executors that have thus kept the money; as where the defendants, executors of the late Sir Crisp Gascoyne, having kept large sums of money in their hands ever since his decease in the year 1761, the Lord Chancellor, on the 3rd of February, 1790, ordered them to pay interest for the same, saying that an executor's

¹ *Scurfield v. Howes*, 3 Bro. Cha. Rep. 91.

paying or not paying interest depended on its being necessary for him to keep the money to answer the exigencies of the testator's affairs or not; but that, where he held the money longer than was necessary, he must answer interest. And the cause coming on again the 14th of March, and the balances appearing very large, and great delays, and the interest exceeding the principal, they were ordered to account for the same. — Mr. Hardinge pressed that one of them having become insolvent, the other executor might answer the sums come to his hands, charging him with being partner in the delay; but the Lord Chancellor refused this, as never done, except where executors joined in the receipts, or did other joint acts, but ordered them both to be liable to the whole costs ^m (14).

^m *Littlehales v. Gascoyne*, 3 Bro. Cha. Rep. 73.

(14) Co-trustees are in this respect contradistinguished from co-executors. In the case of co-trustees, as each hath not a power over the whole of the fund, their joining in a receipt is necessary; and consequently, although they join in such receipt, yet it is a general rule that the trustee who receives the money shall be alone chargeable. But in the case of co-executors each has a power over the fund, and a co-executor joining in a receipt is altogether unnecessary; therefore, if he act without necessity, and join with his co-executor in such receipt, he shall in general be responsible for the consequences; he assumes a power over the property, and it shall not be afterwards permitted to him to say, that he had no controul over it. *Chambers v. Minchin*, 7 Ves. 186. *Brice v. Stokes*, 11 Ves. 323. *Joy v. Campbell*, 1 Sch. & Lef. 341. So if executors, confiding in the representation of their co-executor, that stock standing in the name of the testator is wanting for the payment of debts, do join in a transfer of the stock to him, if he misapply the whole or any part of it, they are chargeable with him to the extent of such misapplication. *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252. S. C. 16 Ves. 478. See also *Underwood v. Stevens*, 1 Meriv. 712. In like manner if an executor has been dealing with the assets much beyond that

Where a trustee in a will, which directed money to be lent at the best interest, by consent of his co-trustee keeps it out at four *per cent.* he shall pay five. As where the testator had directed two trustees, of whom *Ross* was one, to lay out money, which should come to their hands on heritable or personal security at the best and utmost interest; the two trustees agreed that *Ross* should take the money at 4*l. per cent.*, and he admitted by his answer to a bill filed, that 4*l. per cent.* was not the utmost interest which could have been made on personal security. It was admitted on the other side, that *Ross* was a man of large property, and that the testator in his lifetime had been used to place money in his hands at 4*l. per cent.*; but it was insisted that this was a

period of time in which in the ordinary course debts would be paid, and he applies to his co-executors to have such fund transferred to him alone, and on enquiring, they satisfy themselves that there are debts unpaid, and his real purpose was to apply the fund in discharge of such debts, if it afterwards appear that he had in his hands another fund sufficient for the payment of those debts, and such application of the fund was not necessary, nor was in fact devoted to the payment of debts, they shall be responsible. They are in such case subject to the imputation of negligence in being too easy with their co-executor; too remiss in not enquiring how, for so long a time, he had been acting in the administration of the assets. 11 Ves. 254. But though it is a settled rule, that if an executor contribute in any way to enable the other to obtain possession of the assets, he shall be answerable for his misapplication; yet the rule does not extend to those cases in which an executor is merely passive, and does not obstruct the other in recovering the property, for it is not incumbent upon one executor, by force to prevent its getting into the hands of his co-executors. *Langford v. Gascoigne*, 11 Ves. 383. Nor does the rule apply where the signing the receipt is merely of necessity, and the money is not under the controul of both. *Joy v. Campbell*, *supra*. See also on this subject, *Westley v. Clarke*, 1 Eden, 357; *Balchen v. Scott*, 2 Ves. jun. 678. *Bacon v. Bacon*, 5 Ves. 331. *Doyle v. Blake*, 2 Sch. & Lef. 331. *Cross v. Smith*, 7 East, 246. *Walker v. Symonds*, 3 Swanst. 63.

personal favour, and that, according to the directions of the testator's will, the money ought to have been lent at *5l. per cent.*

Lord Chancellor was of opinion that *Ross* ought to be charged with interest at *5l. per cent.* He was anxious to declare he imputed no blame to the defendant, and on this ground refused to give costs against him: but he conceived that, being a trustee, he could not, according to the known rules of courts of equity, be permitted to benefit himself in a contract on the subject of his trust; that though the testator did in his life place money in his hands at *4l. per cent.* yet having by his will directed the best and utmost interest to be made, his intentions of accommodating *Ross* by loans at a lower rate of interest, must be considered as ending with his life. His lordship repeated that he wished to have it understood, that he decided singly on this ground, that a trustee cannot bargain for himself, so as to gain advantage¹.

If a testator gives a legacy to be paid with interest at *4l. per cent.* and the court orders the legacy to be paid into the bank for securing the same, and it produces more than the *4l. per cent.* the legatee is to have the advantage thereof; as shewn in a subsequent part of this work, in treating on cases wherein an executor may be compelled to give security for paying a legacy. And where a legacy was left to A on marrying with consent, and till marriage, to be paid at *3l. per cent.* The executrix lays it out in the funds, and conveys to trustees in trust to pay the legacy with *3l. per cent.* interest, and to pay the *surplus* interest to her. This was held not a good appropriation, and that the stock having sunk in value, the executrix's estate shall make it good^m.

An administrator as well as an executor may be liable to pay interest for money; as where *Baynton* had made interest of money, and the question was, whether he should pay interest, and what interest, for a sum of 868*l.* which he had received as administrator to his brother, and kept for five years, and from that time laid it out on government securities? The

¹ *Forbes v. Ross*, 2 Bro. Cha. Rep. 430.

^m *Cooper v. Douglas*, 2 Bro. Cha. Rep. 375.

Lord Chancellor ordered, that interest should be paid upon the 868*l.* from 1778, when it came into *Baynton's* hands, to March 1783, when it was paid into court; and that such interest should be at the rate of 4*l. per cent*^a.

And where an agent of an administrator kept money of the intestate in his hands, which he had purposed to his principal to lay out in the funds, he was ordered to pay interest. The case was, an administrator gave letters of attorney to *Southouse*, an attorney, to collect and get in the estate, and to lay the same out in the funds. He received several large sums, and by letter recommended to his principal, that the monies received should be laid out in the three *per cents.* which the principal acquiesced in by letter, and informed the attorney he should want no more of the money, and never afterwards made any demand upon the attorney, who, from time to time, informed his principal that he had laid out the money received by him in the funds or otherwise, but which, in fact, he always kept. — The principal dying, and new administration obtained, a bill was filed for an account against the attorney, praying also interest for the sums which he kept in his hands, and did not improve at interest. — It was in evidence, that there was a loss, by the monies received not being regularly laid out, of about 800*l.*

Lord Chancellor said, that it was a clearly established point that the defendant had received money, but that that would not have bound him, if he had not been under a duty to make interest of it, for the benefit of the estate; because, then, it would be only holding the money as a banker holds it, but here was an employment, accepted by the defendant *Southouse*, to lay out the money from time to time. It is said, he is not liable, because an administrator is not bound to invest the monies in his hands, so as to make interest: but here he has bound himself. Therefore an account must be taken of the times when he received monies belonging to the estate, and when he ought to have laid them out: and

^a *Perkins v. Baynton*, 1 Bro. Cha. Rep. 375.

he must answer interest at four *per cent.* from the time when he ought to have laid them out ° (15).

This being premised, the executor may consider whether it is prudent to take upon him the executorship, or to refuse, (as he may, unless he hath administered as executor, as heretofore shewn. And if he hath, and omits to take probate within six months after the deceased's death, he is liable to 50*l.* penalty by stat. 37 Geo. III. c. 90.) (16) Now

° *Brown v. Southouse*, 3 Bro. Cha. Rep. 107.

(15) It is now indisputably settled, that if an executor acts with regard to his testator's property in any other way than his trust requires, he cannot be a gainer by it; any gain must be for the benefit of the *cestuique trust*, and any loss must be replaced by him. See the cases on this subject collected by Mr. *Eden* in his note to *Newton v. Bennet*, 1 Bro. C. C. 362. In respect to the rate of interest at which an executor is to be charged, the cases establish a distinction between negligence and corruption. In the former case he will be made to pay four *per cent.* only; but where there has been corruption or a direct breach of trust it has been usual to charge five *per cent.* *Tebbs v. Carpenter*, 1 Madd. 290. So if the testator's property has been continued in trade by the executor contrary to his duty, the *cestui que trusts* may elect to take either the profits or interest; and if interest is charged it will be computed at the rate of five *per cent.*; for if he were, on such occasions; only to pay four *per cent.* the common rate of interest, it would be a direct encouragement to executors who may be engaged in trade to make use of the testator's property. *Heathcote v. Hulme*, 1 Jac. & Walk. 122. *Crackelt v. Bethune*, Ib. 586.

(16) The penalty for administering without obtaining probate or letters of administration within six calendar months after the death of the testator or intestate, or within two calendar months after the termination of any suit respecting the will or the right to letters of administration, if there be any such, which shall not be ended without four months after the death of the deceased, is now increased to 100*l.* and likewise a further penalty is imposed, after the rate of 10*l.* *per cent.* on the amount of the stamp duty payable on the probate or letters of administration. See 55 Geo. III. c. 184. s. 37.

we shall just take notice of the will which concerns both real and personal estate, or personal estate only, and of where, and by whom, the probate thereof is to be granted: and proceed to shew how the will may be proved in common form, or form of law; and the end and purpose of proving it either way. For proving in common form, the power an executor hath in compelling the ordinary to grant the probate, and what may obstruct his obtaining the same; the form of the executor's oath previous to obtaining it; and the expence of obtaining it.

The will which concerns both real and personal estate ought to be proved in the spiritual court, as in case it concerned personal estate alone^p; but when it concerns only real estate, it ought not to be proved in the spiritual court, as before mentioned^q. Where and before whom the probate of the will is to be granted, having been shewn^r, we need say no more here concerning it.

The manner and form of proving testaments is of two sorts: the one is called the vulgar or common form; the other is termed the solemn form, or form of law^s. If letters testamentary are granted to the party who exhibits the will merely on his oath, by swearing that he believeth it to be the last will of the deceased; this is called proving it in common form^t: and where there is no controversy or dispute touching the will, there the single oath of the executor alone is sufficient for this purpose^u. Where the testament is to be proved in form of law, it is requisite that such persons as have interest, as the widow and next of kin to the deceased, to whom the administration of his goods ought to be committed if he had died intestate, be cited, to be present at the probation and approbation of the testament; in whose presence it is to be exhibited to the judge, and petition to be made by the party who prefers the will, and enacted for the receiving, swearing, and examining the witnesses upon the same, and for the publishing or con-

^p Cro. Car. 396.

^q Page 257.

^r Page 8—16.

^s Swinb. 448.

^t 2 Nels. Abr. 1301.

^u Godolph. 65. If the will is not duly executed, other proof is requisite, as see in page 205, 206.

firming thereof; whereupon witnesses are received and sworn accordingly, and are examined every one of them secretly and severally, not only upon the allegation or articles made by the party producing them, but also upon interrogations ministered by the adverse party, and their depositions committed to writing: afterwards the same are published; and in case the proof be sufficient, the judge, by his sentence or decree, pronounces for the validity of the testament.^x — For proving a will in form of law, the practice has been to examine all the witnesses to the execution of the will. But in a late case Lord Thurlow said, I doubt whether the rule has ever been laid down so largely that the will could not be proved without examining all the witnesses, although the practice has been to examine all y.

The difference of form in proving the will, works this diversity of effect, viz. that the executor of the will, proved in the absence of them who have interest, may be compelled to prove the same again in due form of law; and if the witnesses be dead in the mean time, it may endanger the whole testament; especially if ten years be not passed since the probation, whereby necessary solemnities are presumed to have been observed; whereas the testament being proved in form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament doth still retain its full force^z; but it is probable that this word *ten* in figures may have been mistaken for *thirty*; for Dr. Godolphin says, the will being proved only in common form, it may be questioned at any time within thirty years next after, by common opinion, before it work prescription^a.

This proving of the will in solemn form, is commonly at the instance of some person who desireth to invalidate the same; in which case, his proctor, at the time of exhibiting the will, ought to accept the contents thereof so far forth as it maketh for the benefit of his client; otherwise, if

^x Swinb. 448, 449.

^z Swinb. 449.

^y *Powell v. Cleaver*, 2 Bro. Cha. Rep. 504.

^a Godolph. 62.

any legacy is given to him in the will, he shall lose it for his general impugning the will ^b. If the parties interested do not call the executor to prove the will in solemn form, the executor himself may cause it to be thus proved; and where an executor hath the greatest part of the goods of the deceased bequeathed unto himself, and is in doubt whether, after the witnesses be dead, that the wife or children, or other kindred of the deceased, will contest the validity of the will, he may cite them in special, and all others pretending interest in general (as is the usual practice), to see the will proved by the witnesses; which being done, the will shall not be set aside afterwards (provided there hath been no irregularity in the process,) when the witnesses are dead ^c.

When the will is proved either in common form, or in form of law, the original must be deposited in the registry of the ordinary, and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor, together with a certificate of its having been proved before him; all which together is styled the probate ^d.

For proving the will in common form, it has just been mentioned^e, that the single oath of the executor alone is sufficient for this purpose; and if no suit is depending in the temporal courts concerning the will, an executor, in case of being refused, may have a writ of mandamus to compel the ordinary to grant probate thereof: but if the validity of the will is contested in the ecclesiastical court, it is a sufficient answer by the ordinary to a writ of mandamus, to return, that a suit is depending before him and not yet determined^f. A testator having thought the executor appointed a proper person to be entrusted with his affairs, the ordinary cannot adjudge him disabled or incapable, neither can he insist upon security from the executor, as the testator has thought him able and qualified ^g; yet if an executor becomes *non compos*,

^b 1 Ought. 21.

^c *Ibid.*

^d 2 Black. Com. 508.

^e Page 286.

^f Burr. 2295.

^g 1 Salk 299.

or as it is usually termed, *non compos mentis*, which is, where a person is not of sound mind, memory, and understanding; then the spiritual court may commit administration ^h. If the executor becomes bankrupt, it is said the ordinary cannot grant administration to another ⁱ: yet the court of chancery, where an executor is considered as a trustee, if he becomes insolvent, will oblige him to give security before he enters upon the trust ^k: so in some cases after he has taken upon him the executorship, he may be compelled to give security for paying a legacy, as we shall see under a subsequent head (17).

With respect to an executor becoming bankrupt, as he acts in *auter droit*, i. e. in right of another, his bankruptcy does not take away the legal right of executorship, nor does the commissioner's assignment affect the testator's assets, except as to such beneficial interest as the bankrupt himself may be intitled to. But though a bankrupt executor may strictly be the proper hand to receive the assets, yet if his assignees have received any of the property, a court of equity upon petition will, for the benefit of creditors and legatees, appoint a receiver, with whom the assignees shall account ^l (18). — If the bankrupt executor has wasted the assets, such *devastavit* may be proved as a debt under the commission ^m.

^h 2 New. Abr. 376.

ⁱ 1 Salk. 299.

^k 2 New. Abr. 377.

^l 1 Cooke's Bankrupt Law, 152

^m *Ibid.* 155.

(17) Where an executor becomes bankrupt, the court of chancery will control his powers by appointing a receiver. *Langley v. Hawk*, 5 Madd. 46.; unless it can be satisfactorily inferred that the testator had a deliberate intention of entrusting the management of his estate to a bankrupt executor. *Gladdon v. Stoneman*, 1 Madd. 143. n. But a receiver will not be appointed merely because an executor is poor. *Howard v. Papera*, Ib. 142.

(18) Where an executor, in consequence of his bankruptcy, becomes destitute and incapable of exercising his functions, and elects to relinquish his interest in the testator's property, the court of chancery will permit a credi-

An executor may prove under the commission of bankruptcy debts that were due to his testator. But where an executor was bankrupt, and the petitioner a creditor of the bankrupt's testator, to the amount of 286*l.*—432*l.* of the effects of the deceased were in the bankrupt's hands, and the petition to the Lord Chancellor was, to be permitted to prove this demand against the bankrupt's estate, his lordship ordered that the bankrupt be admitted a creditor for 492*l.* and that the assignees pay the dividends into the bank, subject to further order^m. And where the bankrupt and another were executors of a creditor of the bankrupt, the court on petition, permitted the other executor to prove the debt, even though a suit was pending in the ecclesiastical court, as to the executorship. Yet this was opposed on the part of the assignees, on the ground that though in cases where the bankrupt was executor, the court would appoint a person in the nature of a receiver, to prove a debt under the executor's commission, there being no other manner of securing the fund; yet in this case there being no executor, the ecclesiastical court will grant administration *pendente lite*. But Lord Chancellor ordered, that the petitioner might be at liberty to prove this debt under the commission, and that the dividends should be paid into the bank by the assignees, pending the contest in the ecclesiastical courtⁿ (19).

^m 2 Bro. Cha. Rep. 596.

ⁿ *Ex parte Shakeshaft*, 3 Bro. Cha. Rep. 198.

tor of the testator to file a bill for himself, and to call in the outstanding assets for the purpose of administering them. *Burroughs v. Elton*, 11 Ves. 29.

(19) And in a late case where an executor and trustee had committed a *devastavit*, he was held precluded from proving under his bankruptcy, and liberty so to do was given, in the first instance, and without previous application to the commissioners, to a legatee on behalf of himself and others, with a direction that the dividends should be paid into the bank in trust in the matter. *Ex parte Moody*, 2 Rose, 413. A bankrupt executor can in no case prove under his own commission, without a previous order. *Ex parte Shaw*, 1 Glyn & James, 127.

The executor's oath, previous to obtaining the probate, is usually in this form: "You shall swear that you believe this to be the true last will and testament of A B deceased: and that you will pay all the debts and legacies of the deceased, as far as the goods shall extend, and the law shall bind you; and that you will exhibit a true, full, and perfect inventory of all and every the goods, rights, and credits of the deceased, together with a just and true account, in the registry of the court of , when you shall be lawfully called thereunto. You also swear, that you believe the whole of the goods, chattels, and credits, of or belonging to the said A B at the time of his death, did not in value exceed the sum of £.

"So help you God."

Before an executor applies for proving the will, it is advisable for him to make an inventory, and that whether the same is required to be turned into the ordinary or not; for unless an inventory or a calculation of the value of the deceased's goods, chattels, and credits, be made, the executor cannot be prepared to take the oath required, as has been mentioned with respect to an administrator's oath; and likewise some other reasons why the inventory should be made, and the manner and form of making it shewn.

Having finished our last propositions, we come now to consider in what cases administration must be granted with the will annexed; or, as it is commonly termed, administration *cum testamento annexo*, and the manner of thus granting it.

This administration is granted in divers cases where there is a will, as it may be *durante minori ætate*: *durante absentid*: or *pendente lite*, and on other occasions which we shall mention. Administration *durante minori ætate*, is that which is to be granted during the minority of an infant, who, although he may be appointed executor, cannot administer until he arrives at the age of *seventeen*, till which time the ordinary may grant administration with the will annexed, and as it is held to whom he thinks fit; in like manner as where there

* 4 Burn's Eccles. Law, 202.

† Page 44—50.

‡ Godolph. 102. 5 Co. Rep. 29.

3 Mod. 24. 1 New Abr. 381.

is no testament, he may grant it till the infant attains his full age^r: yet if administration is granted during the minority of divers executors, he that comes first of age shall prove the will, and the administration ceases^s; likewise if there be two executors, one of the age of seventeen, and the other under, administration during the minority of him that is under age is void; because he that is of the age of seventeen may execute the will^t. But as concerning executing a will at the age of seventeen. Where a petition was by a female infant of the age of eighteen, who was executrix of the will of her sister, who had attained twenty-one; (which will the petitioner had proved) stating the will of F. C. the father, whereby the residue of his personal estate was given to the petitioner and her deceased sister, in equal shares, at their respective ages of twenty-one years; and praying that her sister's share of the property which had been paid into the court might be paid to her as executrix. The court would not direct the money to be paid out, but referred it to the master to enquire whether there were any debts or legacies, and to consider of a proper maintenance for the infant. — In support of this petition, Mr. Mitford, petitioner's counsel, said, that the petitioner, notwithstanding her infancy, might be plaintiff at law for all the rights of her sister, although he apprehended that she could not be guilty of a *devastavit* before twenty-one; that therefore he apprehended she was entitled to have a fund in this court paid out. That, if there were any debts or legacies to be paid, the court would order it to be paid out. — Lord Chancellor doubted whether, even in that case, he could order it to be paid; but said that the infant was entitled to the same protection with respect to this property as any other^u.

By statute 38 Geo. III. c. 87. Where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant

^r Page 7.

^s Law of Test. 416.

^t Brownl. 46.

^u *Compart v. Compart.* 3 Bro. Cha. Rep. 195.

shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him. And the person to whom such administration shall be granted, shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minori ætate*.

Administration *durante absentia*, or during absence, as when the executor may be beyond sea; this administration seems to stand upon much the same reason as the administration *durante minori ætate*; it being necessary in both cases that there should be some person to manage the estate of the deceased; and therefore it has been held to be grantable by law^w; and the ordinary may grant it, as he may letters of administration, where there is no will, and the next of kin be beyond sea^x.

Likewise the ordinary may grant administration *pendente lite*, that is, pending a suit: so, where there is no controversy, he may grant administration until the executor comes in, which, as well as the administration *durante absentia* just mentioned, do fall of course as soon as the consideration ceases upon which they were first granted^y.

If the testator makes his will without naming any executor, or if he names incapable persons, or if the executors named refuse to act; in either of these cases the ordinary must grant administration with the testament annexed, to

^w *Clare and Hodges*, 1 Lutw. 342. within the jurisdiction of his Majesty's

^x By statute 38 Geo. III. c. 87. courts, upon application of any creditor, next of kin, or legatee, special administration may be granted (20).
^y 2 New. Abr. 415.

(20) See the case of *Taynton v. Hannay*, 3 Bos. & Pul. 26. where it was held that the authority of an administrator, appointed according to the provisions of this statute during the absence of an executor from this country, did not become actually void upon the death of such executor, but were only voidable.

some other person^a: and when the administration is thus granted the duty of the administrator is very little different from that of an executor, he being to adhere to the testament as heretofore mentioned^a.— For obtaining administration with the will annexed, the will of the deceased must be proved either in common form or form of law^b, in like manner as was lately shewn with respect to the executor's proving it: and when the will is so proved, the original must be deposited in the registry of the ordinary, and a copy thereof on parchment is made out under the seal of the ordinary, and delivered to the administrator, together with a certificate of its having been proved before him^c; in like manner as when the will is proved by the executor, notwithstanding it is called administration *cum testamento annexo*, or administration with the will annexed.

Thus having proceeded, we come now to treat on the method of proving a will in chancery; and from thence we shall proceed with registering a will.

When real estate is devised by will from the heir at law, and there is no occasion or opportunity to prove or establish the same at law, it is often necessary to prove such will in chancery, to perpetuate the testimony thereof: the way to do which, is to exhibit a bill against the heir at law, and to set forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity; and then the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will, or prove their hands if they are dead (21). The will (if the witnesses are examined

^a 2 Black. Com. 503, 504. Concerning those points mention was made, p. 260, 261.

^b Page 1, 2.

^c 2 Black. Com. 508.

^d *Ibid.*

(21) In such cases all the subscribing witnesses to the will ought to be examined by the plaintiff, because, as Lord Camden has observed, "the heir has a right to proof of sanity, from every one of those whom the statute has placed about his ancestor." *Hindon v. Kersey*, 4 Burn. Eccl. Law, 93. And the same rule applies where the court directs an issue to try the validity of the will. *Bootle v. Blundell*, Coop. 136.

in town) must also be left to be examined in the examiner's office; which done, and publication passed, the cause is at an end, an order or rules being first obtained for publication: and the defendant, who is the heir at law, and examines no witnesses touching the validity of the will, may give notice of motion for the plaintiff to pay him his costs to be taxed by a master, which the court usually orders^d. This is what is usually meant by proving a will in chancery, which it might be advisable to do while the witnesses to the will are living; for in this, as well as in other cases where a bill may be filed for perpetuating the testimony of witnesses, it may be that a man's antagonist only waits till the death of some of them to begin his suit, when he may have a more favourable opportunity.

As to registering wills; by several statutes, deeds and wills that affect real estates, and certain chattels real, in the counties of York and Middlesex, are required to be registered; which registering hath no allusion to that in the ecclesiastical courts, but is quite a distinct thing; and it being a matter with which many may be unacquainted, we shall here mention the several statutes by which the same is ordained, and make some observations with respect to effectuating a complete registry.

By the statute 2 & 3 Ann. c. 4. it is enacted, That a memorial of all wills and devises in writing, whereby any honours, manors, lands, tenements, and hereditaments, within the *West-Riding* of the county of *York*, may be any way affected in law or equity, may, at the election of the party or parties concerned, be registered in such a manner as by the said act is directed: and every devise by will of the manors, lands, tenements, or hereditaments, or any part thereof, contained in any memorial so registered as aforesaid, that shall be made and published after the registering of such memorial, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration; *unless a memorial of such will be registered as afore-*

^d 2 Harrison's Cha. Prac. 38.

said. That every such will or probate of the same, of which such memorial is to be registered, shall be produced to the register at the time of entering such memorial, and oath made that the memorial was duly signed and sealed; and the register shall indorse a certificate on such will or probate thereof, and mention the day, hour, and time on which such memorial is entered, expressing also in what book, page, and number the same is entered; and the register shall sign the certificate so indorsed; which shall be allowed as evidence of such registries in all courts of record. And a memorial of such wills as shall be made or published in London, or in any other place not within forty miles of the West-Riding, which may affect lands in the West-Riding, shall be registered, in case of an affidavit (wherein one of the witnesses to the memorial of such will shall swear, that he saw the memorial signed and sealed, before any one of the judges at *Westminster*, or a master in chancery) be brought with the memorial to the register; which affidavit shall be a sufficient authority to the register to give a certificate of the registering such memorial; and the certificate signed by the register shall be evidence of the registry.— That memorials of wills registered within six months after the death of the deviser dying within *England, Wales, and Berwick*, or within three years after the death of every deviser dying upon or beyond the seas, shall be effectual. And in case the persons interested in the lands devised by reason of the contesting such will, or other inevitable difficulty, without their wilful neglect, shall be disabled to exhibit a memorial within the times limited; in such case the registry of the memorial within six months after their attainment of such will, or a probate thereof, or removal of the impediment, shall be sufficient.

By statute 6 Ann. c. 25. it is enacted, That a memorial and registry shall be made of all wills which affect any lands or tenements in the *East-Riding* of the county of York. And by statute 7 Ann. c. 20. a memorial and registry is to be made of all wills whereby lands are affected in the county of *Middlesex*, in like manner as in the West and

East Ridings of Yorkshire. But neither of those three statutes extends to copyhold estates, or to any leases at a rack-rent, or to any leases not exceeding twenty-one years, where the actual possession goeth along with the lease; and in the statute of 7 Ann. there is a reservation as to the chambers in Serjeant's-inn, the inns of court, and the inns of chancery, to which this act doth not extend. By statute 8 Geo. II. c. 6. a registry is to be of all wills affecting lands in the *North-Riding* of the county of York. But this statute does not extend to copyhold estates, or to such leases as just before mentioned.

To effectuate a complete registry, it is necessary that the memorial be on vellum or parchment, which need not be stamped, as neither of the acts require it^c. The memorial is to contain, 1. The name of the testator and his addition, *viz.* the place of his abode and occupation. 2. The date of the will. 3. The premises, or what is mentioned in the will relative to the real estate or chattels real devised thereby, which are to be described *verbatim* as in the will. 4. The names and additions of the witnesses, *viz.* their several occupations and places of abode. — The memorial must be signed and sealed by one of the devisees, his guardians, or trustees; and then attested by two witnesses who saw the same signed and sealed: afterwards one of the two witnesses goes with the memorial and the will, or the probate, or an office-copy thereof (either of which is sufficient), to the register-office, (which, for the West-Riding of the county of York, is at Wakefield; for the East-Riding, at Beverley; for the North-Riding, at York; and for the county of Middlesex, in Bell-yard, Carey-street, London); and at the office where the same is to be registered makes an oath (unless an affidavit hath been made before a judge or master in chancery, as before mentioned) that he saw the memorial signed and sealed; and the oath being so made, he leaves the memorial, together with the will, probate, or office-copy, on which the certificate of the registry is indorsed, as di-

^c Of late required to be on a 10s. stamp.

rected by the statute, and that frequently within four or five days after ; when the will, probate, or office-copy, is fetched, and the register paid his fee for registering. — The form of the memorial is as follows :

A MEMORIAL to be registered pursuant to an act of parliament made for registering deeds, &c. within the [*West, East, or North-Riding of the county of York, or the county of Middlesex, as may be the case.*]

The probate of the last will and testament of A B of ———, bearing date the ——— day of ———, and concerning All [*here pursue the words of the will*] which said will is witnessed by C D of ———; E F of ———; and G H of ———. And this memorial is required to be registered pursuant to the above mentioned act, by me J K one of the devisees in the said will mentioned : As WITNESS my hand and seal this ——— day of ———, in the year of our Lord 18

Signed and sealed }
in the presence of }

JOHN KEMP.

[Place of
the seal.]

CHARLES DUN,
LUKE MITFORD.

For registering deeds the form of a memorial varies very little from that used for a will : but we shall omit mentioning any more here with respect to deeds, as being foreign to this subject, and proceed with what was proposed in respect to proctors, and taxing their bills, and therewith conclude this chapter.

In divers cases it hath been held, that proctor's fees are not suable for in the ecclesiastical court, but may be sued for in the temporal courts ; from whence a prohibition may be had to stop proceeding in the ecclesiastical court, if suit should be there commenced ; — upon proper application, as by petition from any suitor, or person that sues, in the ecclesiastical court, the judge thereof has undoubted right to tax the proctor's bill. The method of doing it, as usually practised, is, for the judge to refer it to the register, direct-

ing the respective parties to attend him if they think fit, one to make his exceptions, and the other to justify the several articles or items of his bill; and the register to make his report to the judge, who thereupon proceeds to tax the bill. If the register has any doubt, the assistance of the other proctors may be required. The fees alleged to be given to counsel, if denied by the client, as also his demand for any unusual or extraordinary articles which do not appear from the proceedings in the cause, must be cleared up to the satisfaction of the judge, either by the proctor's oath (if he voluntarily offers it, and there be no affidavit to the contrary), or by receipts and vouchers from those to whom the money is alleged to be paid, or by producing letters and orders from his client ^f.

CHAPTER V.

OF EXECUTORS, AND SUCH ADMINISTRATORS WHO HAVE THE
ADMINISTRATION GRANTED WITH THE WILL ANNEXED.

THE office and duty of those administrators who have the administration granted with the will annexed, being, as hath been seen in several parts of this work, very little different from that of executors, we shall now take a view of both, as with respect to their power and what they are interested in; their getting in the deceased's effects; and what shall be assets in their hands to make them chargeable; their office and duty in paying debts and legacies. And as to debts, we shall here take notice of such as are barred by the statute of limitations, and of some that are to be paid with interest; and then of legacies; and when the same are to be paid; and what interest shall be allowed thereon. Likewise what executors and administrators are to observe before they pay legacies; and with respect to paying infants and married

^f 4 Burn's Eccles. Law, 233.

women. In what court legacies are to be sued for; and cases in which security may be required for paying the same. But as some of those particulars have been discussed in the former part of this work, we shall now have occasion only to take a cursory view thereof, and make a little addition to what has heretofore been mentioned; but with respect to legacies, which we have hitherto scarce touched upon, those will here require a discussion, as they shall have, after some notice has been taken of the other particulars.

With respect to the power an administrator hath by virtue of administration obtained from the ordinary; this being very nearly allied to that of an executor, except in a few particular instances wherein the executor differs from an administrator, we need here only refer the reader to the first section of the second chapter of the Law's Disposal^a; and to what has been mentioned under the head of proving the will^b, for a discovery both of the executor's and administrator's power. And as what the administrator is interested in hath been treated on, and being the same with what an executor, as such, has interest in, we may refer to the second section of the last mentioned chapter^c, and to what has heretofore been mentioned^d, for a discovery both of what an executor and administrator is interested in. And as to getting in the deceased's effects, and what shall be assets in the administrator's hands to make him chargeable; this likewise having been treated on^e, as well as his office and duty in paying debts^f; and being alike applicable to an executor, we shall now make some addition to what has been mentioned concerning assets, first attending to real estate devised for paying debts, to the same being mortgaged; and afterwards to paying testator's debts and legacies, in allusion to what has been treated on in the former part of our work^g. So likewise, we shall make some addition to what was mentioned with respect to debts, as concerning those that may be

^a Page 23.

^b Page 257.

^c Page 33.

^d Page 214. 244. 258, 259, 260.

^e Page 51.

^f Page 66.

^g Page 55—63. 77. 117.

barred by the statute of limitations, and debts to be paid with interest.

As concerning real estate devised for paying debts, we may observe the general rule is, that the personal estate shall be first charged with the payment of debts and legacies; and the testator cannot exempt it from being liable to his debts, as against creditors⁽¹⁾; but as between heir and executor, he may charge them upon his real estate; which is not primarily liable, and discharge the personal estate: but, although there are several ways by which a man may give his real estate for payment of his debts, yet if there be not in the will, either express words, or a *manifest* intent of the testator to discharge the personal estate, it shall be first liable^b. And in all cases it shall be applied in discharge of the testator's personal debt, or general legacy, unless he by express words or *manifest* intention exempt it^c.

It has been held that a devise of a competent part of real estate to be sold to pay debts and legacies, does not exempt the personal estate. — The general rule of law and equity is, that the personal estate is the first fund for payment of debts; and as to proper legacies it is considered as the only fund, both in the ecclesiastical and in the court of chancery; if, therefore the personal estate is to be exempted from these charges, it must be so expressed, or it must appear from a plain necessary implication, arising from the words of the testator; and in such case of an implication or plain intention, without express words, it must appear that the personal estate is given as a specific bequest in some shape^d.

The personal estate may be so exempt, as where the same

^b 1 Wilson, 24. 1 Bro. Cha. Cha. Rep. 454. 1 P. Will. 294. Rep. 462. note 1. 4th edit.

^c *Ancaster and Mayer*, 1 Brown's

^d Lord *Inchiquin v. French*; Amb. Rep. 33.

(1) That is to say, he can only exempt it from the payment of debts by the substitution of a sufficient fund, and it will continue subject to the claims of creditors in the event of a deficiency in the fund provided. *Gittins v. Steele*, 1 Swanst. 29.

under B's will passed as a specific legacy to the executrix; and it was held that it should not be applied in exoneration of the real estate¹. And where testator gave several specific parts of his personal estate, and then gave part of his real estate in strict settlement, and devised the remainder of his real estate to trustees in trust, to sell for the payment of debts, and in case that should not be sufficient to discharge the debts, he charged the deficiency on the devised real estates. He then gave the residue of his personal estate, not before bequeathed, to his wife. The court held she took it wholly exempt from the debts. And where testator by his will charged his whole estates with payment of all his debts, legacies, and funeral expences, and for that purpose he devised particular lands to trustees, in trust to sell the same, and pay his debts, legacies, and funeral expences, and he gave to his wife all his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate. Lord Bathurst determined the personal estate to be exempt^m.

So where the testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and other debts, the residue to be added to his personal estate.—The only question was, whether under this devise, the real estate should exonerate the personal estate.—It was argued that, express words are necessary to exempt the personal estate, and in support thereof different cases were citedⁿ.

Master of the Rolls.—I have no doubt about this case. The general rules are very clear that the personal estate is the fund first liable, and that the testator cannot exonerate it without substituting another fund. But there is no magic in words; no peculiar form of expression is necessary in order to exonerate the personal estate. If the intention of the testator be evident to exonerate the personalty, it must

¹ *Walker v. Jackson*, 2 Atk. 624.

ⁿ 3 P. Wms. 325. *Samwell v.*

^m *Anderton v. Cook, Kynaston v. Wake*, 1 Bro. Cha. Rep. 114. *Ancas-Kynaston*, cited in 1 Bro. Cha. Rep. 456, 457.

ter and Mayer, Ibid. 454.

be exonerated.—I must declare, that the money arising from the sale is to be applied in payment of debts^o (2).

As to debts secured by mortgage the same rule holds as before mentioned, and the personal estate of the testator shall be primarily applied in discharge of his personal debt, unless he by express words or manifest intent exempt it; and where a mortgage in fee was made redeemable on payment of 300*l.* and interest upon any Michaelmas day, on six month's notice; mortgagor dies, having devised his per-

^o *Webb v. Jones*, 2 Bro. Cha. Rep. 60.

(2) The general rule that the personal estate is the primary fund for the payment of debts, is undeniable, and to warrant a departure from that rule, there must either be express words to exempt it, or for want of such express words, it must appear on an examination of the whole will, and by necessary implication, to be the plain and manifest intention of the testator, not merely to charge the real estate, but so to charge it as to exempt the personal. According to the old law, nothing short of an express direction would have had the effect of exemption, and the introduction of the modern rule dispensing with the necessity of such a direction, has been regretted. 9 Ves. 447. 1 Meriv. 216. 1 Swanst. 28. The question whether the personal estate is exempt, is not, as Lord Thurlow has observed, to be decided by precedent, but the court must, in every case, abide by the clear intention of the testator to be collected from every part of the will. As a general proposition, it may be laid down, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to the payment of his debts; for the rule of construction which courts adopt, is such as aims at finding, not that the real estate is charged, but that the personal estate is discharged. 1 Meriv. 220. The principle is, that the debts of the testator, whether they are created by mortgage or bond, or by mere simple contract, are considered as his personal debts, and, in the instance of a mortgage debt, the charge on the real estate is regarded as merely collateral. See the cases on this subject collected by Mr. Eden, in his notes to *Stevenson v. Heathcoate*, 1 Eden, 38. and *Ancaster v. Mayer*, 1 Bro. C. C. 454. See also *Greene v. Greene*, 4 Madd. 148. *Michell v. Michell*, 5 Madd. 69.

sonal estate to his wife. The personal estate was held liable to pay the mortgage in favour of the heir^p.

Lands subject to or devised for payment of debts shall be liable to discharge mortgaged lands either descended or devised^q. — Where A. devised lands to R. M. in tail, then in mortgage for 1800*l.*, and devised other lands to T. M. subject to the payment of his debts, in case his personal estate should not prove sufficient. It was held the 1800*l.* must be paid as a debt out of the personal estate, and, if deficient, out of the real estate so devised to T. M^r. And where Sir R. W. was seised in fee of estates in C. which were mortgaged to a considerable amount, and also of an estate in the Isle of Wight, and being seised for life with an ultimate remainder or reversion in fee, after limitations in tail, to himself (as heir at law to his brother,) of an estate which was so devised by his brother, and possessed of an equal interest in money, bequeathed by him to be laid out in lands; devised the mortgaged lands to several uses, and among other things to the plaintiff for life, remainder to her sons in tail, remainder to her daughters as tenants in common. He devised the estate in the Isle of Wight to trustees for twenty-one years, among other uses to pay his *bond and book debts*, if his personal estate should not be sufficient, and by a further clause to pay *all his debts*. It was held, this trust term jointly with the personal estate, shall exonerate the mortgaged estate^r.

So lands subject to or devised for payment of debts shall be liable to discharge mortgaged lands either descended or devised, even though the mortgaged lands be devised expressly *subject to the incumbrance*; as where one devised his lands in D to A (his cousin) an infant, at her age of twenty-one, *subject to the incumbrances thereupon*, and the rents during the infancy to be paid to her father, and devised all his other lands to trustees to pay his debts. — Master of the Rolls, The devise of

^p *Howel v. Price*. 1 P. Will. 291.

^q *Ibid.* 294. note 1.

^r *Bartholomew v. May*, 1 Atk. 487.

^s *Tweeddale v. Coventry*, 1 Bro. Cha. Rep. 240.

the estate subject to the incumbrance is no more than what is implied, for the testator could not do otherwise ; but when the testator devises other lands to pay his debts, this must be intended all his debts, and consequently the debt by mortgage is part of those debts which are to be paid off out of the money arising by sale out of the trust estate ; and this is the stronger by the testator's having appointed the rents and profits during the infancy of his god-daughter to be paid to the infant's father for the sole use of the infant, which is as much as to say, that they shall not go to be applied in discharge of the mortgage ^t.

Where one mortgaged a fee-simple estate and devised the same, and also devised an estate held by him for three lives, to his wife, and after making his will purchased the reversion in fee of the lifehold estate, whereby the devise thereof was revoked, and the estate descended to the heir ; it was held that the lands descended shall exonerate the mortgaged lands devised. But at the first hearing of this cause, Lord Hardwicke held the wife was not intitled to have such exoneration in a court of equity. Yet after a rehearing, and taking twelve months to consider, his lordship said he did not think the case of the heir at law so hard as before, because it was not the intention of the testator that the heir should take any part of his estate ; and it was a mere accident that threw a part upon him, viz. the ignorance of the testator that it was necessary after purchasing the fee to republish his will ^u (3).

^t *Serie v. St. Eloy*, 2 P. Will. 386.

^u *Gallon v. Hancock*, 2 Atk. 424.

(3) With respect to the priority of application of real assets (when the personal estate is either exempted or exhausted) it seems that, 1st, The real estate *expressly devised* for payment of debts, shall be applied ; 2dly, (to the extent of the specialty debts, and in certain cases of simple contract debts, see ante, p. 55. n. 17.) The real estate *descended* ; and 3dly, The real estate specifically devised, subject to a *general charge* of debts. And this order of administration will be observed, unless the testator expressly exempt the

Unincumbered lands and mortgaged lands being both specifically devised (but expressly "*after paying of all debts*") shall contribute in discharge of the mortgage; as where one seised in fee of the manors of A and B, mortgages A for 4000*l.* and by will charges all his real estate with payment of his debts, and devises A to C and B to D, and dies; the

descended estates, and substitute those which are specifically devised, as the fund out of which payment is to be made. But the mere subjecting of the latter to the payment of debts will not have the effect of exonerating the descended estates, unless there is a clear intention that they should be wholly exonerated. Therefore where a testator exempted his personal estate from the payment of mortgages, on certain parts of his real estate, which he devised expressly subject to the payment of the incumbrances upon them, it was nevertheless held that the descended estates were liable to discharge the incumbrances, on the principle that the primary fund is not exonerated, merely because an auxiliary fund is provided, unless it be the manifest intention of the testator to exempt it. *Barnewell v. Lord Causdor*, 3 Madd. 453. In the case of *Donne v. Lewis*, 2 Bro. C. C. 257. Lord Thurlow considered that, with respect to the application of descended estates, it is immaterial whether they were purchased after the execution of the will, or whether the testator had them before. But Lord Eldon in a late case, *Milnes v. Slater*, 8 Ves. 295., expressed both his own and Lord Redesdale's doubts upon that subject, and observed that the circumstance of the devisor having other estates which he does not touch, goes a great way to shew that ordering the debts to be paid out of the devised estates, he does not intend the application of those descended; whereas, if at the time of the devise he has no land except the land devised, but afterwards acquires other lands, it is singular that a rule, creating a rule of distribution with reference to the present circumstances of the devisor, should be taken to create a rule of distribution, under circumstances which commence afterwards probably not contemplated by him. See also *Manning v. Spooner*, 3 Ves. 114. *Howse v. Chapman*, 4 Ves. 546. *Harmood v. Oglander*, 6 Ves. 199. *S. C.* 8 Ves. 106. *Hill v. Cock*, 1 Ves. & Bea. 174.

devisee of A shall compel the devisee of B to contribute to pay the mortgage on A ^x.

But in all these cases the debt being considered as the *personal* debt of the *testator himself*, the charge on the real estate is merely collateral. The rule, therefore is otherwise, where the charge is on the *real estate principally*, although there be a collateral personal security. Or, where the debt (although personal in its creation) was contracted originally by another.

If a man mortgage lands, and covenants to pay the money, and dies, the personal estate of the mortgagor shall, in favour of the heir, be applied to exonerate the mortgage. So it is, though there was no covenant, if the mortgagor had the money; because it was his debt, and he is bound to make it good though the land be a defective security; but if grandfather mortgages and covenants to pay, and the land descend to his son, and his son dies, the son's personal estate shall not go in aid of this mortgage. A mortgages his land to B, and after sells it to C for 1000*l.*, which includes the mortgage money; C, the purchaser, shall pay the mortgage, for he had made it a debt in himself (4).

^x *Carter v. Barnardiston*, 1 P. ^y *Cope v. Cope*, 2 Salk. 449. Will. 305.

(4) The distinction seems to be this, Where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act to shew an intention to transfer that debt from the estate to himself, as between his heir and executor, but merely that which he must do, if he pays a less price in consequence of that mortgage, that is, indemnify the vendor against it, he does not by that act take the debt upon himself personally. Per Lord *Alvanley*, 5 Ves. 132. But where the result of the transaction is a personal contract, if there is any thing more than a mere purchase of the equity of redemption, any thing raising a new contract by the purchaser with the mortgagee, that has the effect of constituting a new debt from the purchaser, to which his personal estate will be liable. *Woods v. Huntingford*, 3 Ves. 128. *Waring v.*

Where A seised in fee mortgages his land, leaving B his son and heir, B's personal estate shall not be applied to pay this mortgage, because it was not B's debt: so though the mortgage being transferred in B's time, B covenants to pay the money, yet the debt not being originally the debt of B, his covenant is only a surety, and the land the original debtor, which C shall take with the burthen^z. And, where land descended to the wife subject to a mortgage made by her father; on assignment of the mortgage the husband covenanted for payment of the money to the assignee, it was decreed the husband's personal estate was not liable to exonerate the mortgaged premises, for the debt was *originally* the father's, and *continuing* to be so, the covenant was an additional security for the satisfaction only of the lender, and not intended to alter the nature of the debt^a.

So where testator charged his real estate (which was subject to a mortgage contracted by his ancestor), and also all his personal estate, with his debts and legacies; it was decreed the mortgage shall be borne by the estate originally liable, and not paid out of his estates, and the executrix having paid it out of the personal estate shall be repaid the money^b (5).

And where there was a charge upon a term for payment

^z *Evelyn v. Evelyn*, 2 P. Will. 664.

^b *Lawson v. Hudson*, 1 Bro. Cha. Rep. 58.

^a *Bagot v. Oughton*, Ibid. 347.

Ward, 7 Ves. 332. *Earl of Oxford v. Lady Rodney*, 14 Ves. 417.

(5) In a modern case where a mortgagor of copyhold devised the same, together with his personal estate, to his wife, and she died without paying off the mortgage, it was held that her heir was not entitled to have the mortgage paid out of the personal estate of the mortgagor, inasmuch as his personal property became by the bequest the personal estate of the wife, and the mortgage debt not being her debt, her heir had consequently no equity to have it discharged out of her personal estate. *Scott v. Beecher*, 5 Madd. 96.

of debts, it was held that a leasehold estate purchased by the testator subject to a mortgage, shall bear the burthen of that mortgage, it not being properly the debt of the testator, the charge under which it came to him being prior to his purchasing it, and inherent in the estate ^c.

Fawcett, having contracted a debt which was by simple contract, devised his real estate to *Colville*, who afterwards charged this debt upon the estate, so devised to him. *Colville* by his will gave a leasehold estate to his wife, to whom he also gave his personal estate. A bill was filed, praying that the personal estate of *Colville* might exonerate the real, of this debt. — Master of the Rolls, The general personal estate shall be applied in favour of the heir, be he *hæres natus* or *hæres factus*, but not so as to defeat a specific devise of the personal estate. If this be a specific devise, there is no doubt it is free from the debt. If it were given, in these terms, to a person who was not the general representative, it would be a specific devise; does it make it otherwise, that, in this case, the wife is general representative? I am strongly inclined to think that it is a specific devise. — Where an estate descends, or comes to one subject to a mortgage, although the mortgage be afterwards assigned, and the party to whom it descended, enter into a covenant to pay the money borrowed; yet that shall not bind his personal estate. Here it was a very honourable transaction, on the part of *Colville*, as to the creditor. The general reasoning on the subject is all in *Evelyn v. Evelyn*. The specific devise is not liable to the debt ^d.

Having thus proceeded, we shall now advert to our position concerning the personal estate being to be charged first with the payment of debts and legacies, and that the testator cannot exempt it from being liable to his debts as against creditors, and here attend to what was mentioned in a former part of our work concerning *legal* and *equitable* assets ^e. The heir having *real* assets, and not being liable to pay simple con-

^c *Ancafter v. Mayer*, 1 Bro. Cha. Rep. 454.

^d *Tankerville v. Fawcett*, 2 Bro. Cha. Rep. 57. (S. C. 1 Cox, 237.)

^e Page 77.

tract debts of the ancestor therewith, where there is personal estate sufficient for paying the same ^f.

As to *legal* and *equitable* assets, it has been shewn in the part of our work just now referred to, that in distributing the former a preference is allowed to creditors according to the superiority of their debts; but not so with respect to the latter. And here we may observe that it being the object of a court of equity, that *every* claimant upon the assets of a deceased person shall be satisfied as far as such assets *can*, by any arrangement *consistent* with the *nature* of their respective claims, be applied in satisfaction thereof, it has been long settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien; if therefore a specialty creditor, whose debt is a lien on the *real* assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of a specialty creditor against the real assets, so far as the latter shall have exhausted the personal assets in payment of his debt. So, where lands are subjected to payment of *all* debts, a legatee shall stand in the place of a simple contract creditor who has been satisfied out of personal assets. So where legacies by will are charged on the real estate but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole. But from the principles of these rules it is clear they cannot be applied in aid of one claimant so as to defeat the claim of another, and it is to be observed that none of the rules *subject* any fund to a claim to which it was not before subject, but only take care that the *election* of one claimant shall not prejudice the claims of the others, and for the same reasons the application of the personal assets in case of the real estate mortgaged does not take place to the defeating of any legacy ^g.

As concerning fraudulent devises, which are provided against by the stat. 3 W. & M. c. 14. (related in a former part

^f Page 117.

^g 1 P. Will. 679. note 1. 4th edit.

of our work); it is observable that, the provision in this statute was introduced for the benefit of creditors merely; and if a devise for payment of debts does not provide for it in a practicable manner, it does not take the case out of the statute. — Testator made a general charge of his debts upon his real estate, exempting his personalty from the payment thereof. He then devised a particular estate to trustees for that purpose, excepting his capital mansion-house. The decree was, that the devised trust estate should be sold for the payment of debts. The master sold the whole devised trust estate, not excepting the mansion-house, and upon its being referred to the master to consider, whether a good title could be made, he reported, there could not be a good title made to the mansion-house. On an exception to the master's report, Mr. Lloyd cited two cases^h to shew that a devise for payment of debts, though out of rents and profits only, took the case out of fraudulent devises, and that a creditor, even by specialty, could only take it in the way in which the testator thought proper to give it him; though had there been no devise to pay debts, he would have had a right to have his debt raised by sale.

Lord Chancellor said, he was not aware that a gift of the estate, for the payment of debts, in a manner which could not answer the purpose, was such a devise as would take the case out of the statute. That if the master reported that the debts could not be paid by the means provided in the devise, he would either here, or in the house of lords, (unless the house over-ruled him) order the estate to be sold, notwithstanding the statute; and should consider it so far as fraudulent. — In the present case he should order the devised estate to be sold, without including the capital mansion-house, if, without it, the estate was sufficient for payment of debts, if not the mansion-house must be sold. — But it being understood that it was sufficient without the mansion-

^h *Lingard v. Lord Derby*, 1 Bro. Cha. Rep. 311. *Ridout v. Lord Plymouth*, 2 Atk. 104.

house, the order went so, and the exception was overruled¹ (6).

Thus having proceeded concerning debts, whereby we have been led to touch upon legacies, which will be treated on hereafter, as those claim the next regard; and after the debts are all discharged, must be paid by the executor, so far as his assets will extend: and here he is not allowed to give himself the preference^k by retaining, as in the case of debts. But before we enter on the discussion of legacies, we shall advert to what was proposed with respect to debts barred by the statute of limitations, and debts to be paid with interest.

By statute 21 Ja. I. c. 16. commonly called the statute of limitations, persons are barred of actions for debts due on simple contract, or for arrears of rent, and of actions that may be had for some other purposes; unless the same be brought within six years after the cause thereof commenced, or after the debts or rent became due: but in this act there are exceptions with respect to infants, persons beyond sea, and some others. And there are means by which the bar of the action may be saved, and the debt revived; as it is clearly agreed, that if after six years the debtor acknowledges the debt, and promises payment thereof, that this revives it and brings it out of the statute; as if a debtor by promissory note, or simple contract, promises within six years of the action brought, that he will pay the debt; though this was barred by the statute, yet it is revived by the promise, which being proved, an action may be supported for the recovery of it: the acknowledgment and promise being a new evidence of the debt¹. And if the debtor by his will directs that all his debts shall be paid, or makes any provision for the payment of his debts in general, this will revive it, and bring it

¹ *Hughes v. Doulben.* 2 Bro. 1 Salk. 28, 29. 5 Mod. 425, Cha. Rep. 614. (S. C. 2 Cox, 170.) 426.

^k 2 Black. Com. 512.

(6) See ante, p. 118. note (13).

out of the statute, and make his executors liable ^m (7). Where the debt is considerable, and there is a danger of its being barred by the statute, it is common for the creditor

^m Prec. Cha. 385.

(7) A floating notion that a devise of real estate subject to the payment of debts revived a simple contract debt upon which the statute of limitations had operated before the testator's death, has certainly prevailed for a great length of time, and has been countenanced by very high authorities. This doctrine, however, was not supported by any direct decision upon the point, but rested simply upon *dicta*, opposed not only by *dicta*, but by an express adjudication. See *Legastick v. Cowne*, Mos. 391. It received the decided disapprobation of Lord *Kenyon*, Lord *Alvanley*, Lord *Redesdale*, and Lord *Eldon*, but was seemingly approved by Lord *King*, Lord *Hardwicke*, and Lord *Mansfield*. The notion was that debts barred by the statute were comprehended under the description of *debts* in a devise for payment of debts, because they still subsisted *in foro conscientiae*; but it is difficult upon principle to conceive that a testator, in subjecting his real estate to the payment of his debts, could intend to prescribe to his executors any rule either in admitting or rejecting debts; or to recognise any particular debt as one which had existed and still remained unpaid: nor is it easy to infer, that the creation of a fund by him for the payment of debts could have any operation upon the enquiry, what were his debts, or the mode in which that enquiry was to be prosecuted. The supposed doctrine, indeed, stood upon an unnatural conjecture as to the intention; and it was pregnant with danger and injury by inviting stale demands, and discouraging provisions for the payment of debts. But noticed as the general question had been in many cases, it was not until lately that it called for an express decision, and then the Vice Chancellor (Sir *Thomas Plumer*) having traced the history of the supposed rule to its foundation, and having examined to the bottom every authority on the subject, in an elaborate judgment determined, that a devise in trust for payment of debts did not revive a debt upon which the statute of limitations had taken effect by the expiration of the time before the testator's death, but that the demands of creditors are in such a case

within the six years after the same was contracted, to sue out a writ, as by way of commencing an action against the debtor; which writ his attorney gets returned by the sheriff, and then enters it on a roll, which he files with the proper officer; and hereby the debt is saved from being barred by the statute at the expiration of six years, as it otherwise might be.

With respect to interest due on debts, of which mention has been madeⁿ: It is said that, where a man *devises* his real estate for payment of his debts, that those due on simple contract, as well as others, shall carry interest, because the real estate, being now the fund out of which the debts are to be paid, yields annual profit^o. But it has been held otherwise^p. And where money was raised by deed upon land, and invested in the name of a trustee, to pay debts, the residue to the use of the trustee, the simple contract debts not being changed in their nature, therefore were not allowed to bear interest. But if the creditors had filed bills, and obtained separate reports, from that time their debts would have carried interest^q.

Bennet, as executor, kept the money of his testator in his hands, without accounting for a long time, and employed it in his trade; and being sued by *Newton*, a simple contract creditor, the question was, whether he shall pay interest?

ⁿ Page 75.

^o 2 P. Will. 26.

^p *Barwell v. Parker*, 2 Ves. 363.

Earl of Bath v. Earl of Bradford,
2 Ves. 587.

^q *Shirley and Earl Ferrers*, 1
Bro. Cha. Rep. 41.

left open to examination by all the means which the rules of law and equity admit. *Burke v. Jones*, 2 Ves. & Bea. 275. This determination, however, is to be received with the limitation imposed by Lord *Redesdale*, who has expressed himself of opinion that where the death occurs after the statute has begun to operate, but before the time has ran out, the trust for payment of debts will keep the debt alive, so that the statute cannot attach. *Executors of Fergus, v. Gore*, 1 Sch. & Lef. 109.

By the Lord Chancellor : There are many sayings in the books, to prevent it being laid down as a general rule, that an executor shall pay interest for money used in the course of his trade ; but it does not follow that he may keep the estate of his testator for a long course of time idle, from the persons entitled to it by the will. — The doctrine I am desired to lay down is, that an executor may keep his testator's money, and apply it to the uses of his trade, without being liable to interest. — It has been argued to this extent, that, if the executor is solvent, he shall not pay interest ; if he is not, he shall. — I cannot see the reason of that case. It is impossible this should have been laid down as the law of the court. I do not say, he shall pay interest on the ground of his having called in a debt which bore interest, because an executor has an honest discretion to call in money which he thinks in hazard ; but when it is called in, and made profit of in the way of his trade, I think he should be charged with interest. The books say, he shall not, because it might be lost, and if it was he must have answered it. — This argument would apply equally to the case, where the executor makes actual interest ; for the party to whom it is lent may become insolvent. When the executor did not apply the money to the uses of the will, or bring it hither, I must take it, that he kept it for the purpose of making advantage of it in the way of his trade. — From 1760, *Bennet* had not a colour of reason for not applying it. — He has not shewn any reasonable cause for keeping the money, but has done it merely for the sake of using it in his trade ; he therefore must be charged with interest *.

Legacies, as we have lately hinted, are to be paid after debts ; and where there is no time limited for paying a legacy, the executor has one year after the testator's death for paying it †, in like manner as heretofore mentioned concerning distribution by the statute ‡. — It is held that the

* *Newton and Bennet*, 1 Bro. Cha. Rep. 359.

† 2 Salk. 415.

‡ Page 84.

statute of limitations is no bar to a legacy, although it may have been due twenty years before demanded ^u (8).

A legacy is a bequest or gift of goods and chattels by will or testament; and the person to whom it is given is styled the legatee, which every person is capable of being unless particularly disabled by the common law or statutes ^w; as traitors, popish recusants, artificers going out of the kingdom and exercising their trades in foreign parts ^x, persons for the second offence denying the Trinity, or asserting that there are more gods than one ^y, and some others.

This bequest, being of goods and chattels, vests in the executor, as was mentioned in a former part of our work, and the legacy is not perfect without his assent; for if I have a general legacy of 100*l.* or a *specific* one of a piece of plate, or horse, or the like, I cannot in either case take it without the consent of the executor ^z, whose business it is first to see whether there is a sufficient fund left to pay the debts of the testator, to which the personal estate is always liable, as we have lately shewn. And, in case of a deficiency of assets, all the general legacies shall abate proportionably, in order to pay the debts; but a *specific* legacy is not to abate or allow any thing by way of abatement, unless there are not sufficient without it. So upon the same principle, if the legatees have been paid their legacies, they are afterwards obliged to refund a rateable part, if debts should come in more than sufficient to exhaust the *residuum*, after the legacies paid ^a.

A specific legacy, of which we have lately had some description (strictly speaking), is said by Lord Hardwicke to be

^u 2 Freem. Rep. 32.

^w 2 Black. Com. 512.

^x Stat. 5 Geo. 1. c. 27.

^y Stat. 9 & 10 W. c. 32.

^z Co. Litt. 111.

^a 2 Black. Com. 512.

(8) But after a lapse of time, forty years for instance, without any demand of the legacy, a court of equity will presume that it is satisfied. *Jones v. Turberville*, 2 Ves. jun. 11.

a bequest of a particular chattel, specifically described and distinguished from all other things of the same kind, or, (in other words) an individual legacy. Money, therefore, if sufficiently distinguished, may be the subject of a specific bequest, as, money in a certain chest. — So of stock. — So a bequest of part of a specific chattel may be equally a specific legacy. On the other hand, a mere bequest of *quantity*, whether of money or any chattel, is a general legacy, as of a quantity of stock, and where the testator has not such stock at his death, it is a direction to the executor to procure so much stock for the legatee^b. — Personal annuities given by will are general legacies, and a devise of an annuity for life charged on the personal estate, where there is a deficiency of assets, shall abate in proportion with the other legatees^c (9).

^b 1 P. Will. 540. note 1. 4th edit.

^c *Hume v. Edwards*, 3 Atk. 693.

(9) Lord *Thurlow* has remarked that it is generally a difficult question to decide whether a legacy be specific or pecuniary. *Stanley v. Potter*, 2 Cox, 182. And it is to be observed, that the same legacies may be specific in one sense, and pecuniary in another; specific, as being given out of a particular fund, and not out of the estate at large; pecuniary, as consisting only of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it. *Smith v. Fitzgerald*, 3 Ves. & Bea. 5. The ordinary criterion of a specific bequest is, that it is liable to ademption; that if the thing bequeathed is once gone, it is lost to the legatee; and to render it specific, the legatee must consequently be able to fix on the individual thing given. The difficulty which has arisen in many of the cases on this subject has proceeded from not adverting to the distinction between a gift of a sum of money, with a reference to the fund from which it is to be taken, which is termed a demonstrative legacy, and is payable, though the fund out of which it is directed to be paid does not exist at the testator's death; and a bequest of the fund itself, or an aliquot part of it, as a gift "of my stock," or "in my stock," or "part of my stock," which, when the particular stock is referred to, is clearly specific. 4 Ves. 750. *Parrott v. Worsfold*, 1 Jac. &

In a late case Lord Thurlow citing a variety of cases pertaining to *specific* and *general* legacies, made many learned observations on the distinction between them; and his lordship held the bequest of a bond for 3500*l.* to be a specific legacy, but that the same was not adeemed by the testator having received part of it in his lifetime, as a dividend under the bankruptcy of the obligor; it appearing to be the testator's intention that the legatee and her children should have the debt secured as a provision for them. — In the same case where a legacy was "of my 1000*l.* East-India stock," it was clearly held to be specific, and adeemed by the testator's having sold the stock^d. And where testator reciting that he was possessed of a certain sum in navy bills, bequeaths it. This was held to be a specific legacy, and to pass only such navy bills as he possessed at his death^e (10).

^d *Ashburner and Maguire*, 2 Bro. Cha. Rep. 108.

^e *Pitt v. Camelford*, 3 Bro. Cha. Rep. 160.

Walk. 602. In the case of a specific bequest of stock, an error in the description of it, as if stock of one denomination be given, and the testator have only stock of a different kind, will not vitiate the legacy, if it be manifest that the testator intended the stock, though misdescribed, should pass. *Door v. Geary*, 1 Ves. sen. 255. *Pentecost v. Ley*, 2 Jac. & Walk. 207. But if the testator have not any stock, the legacy fails, and nothing passes by the gift. *Evans v. Tripp*, 6 Madd. 91. So in other cases of *error demonstrationis*, the misdescription will be rejected, and the bequest, though specific, will carry the thing misdescribed, if consistent with the testator's intent. Thus, a gift of a grey horse will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description; but if the testator had no horse, the executor is not to buy a grey horse. *Id. Ibid.* The late decisions have leant much against specific legacies requiring a clear indication of intention to make a legacy specific. They are referred to in *Apreece v. Apreece*, 1 Ves. & Bea. 365. n. (a). See also, *Mann v. Copland*, 2 Madd. 223. *Barker v. Rayner*, 5 Madd. 208.

(10) The principle of ademption by receiving or selling the thing given is, that the thing given no longer exists; for if, after the receipt or sale of it, it could be demanded, that

A specific legacy, as it has in some respects the advantage, so in other respects it has the disadvantage of a general

would be converting it into a pecuniary instead of a specific legacy. *Fryer v. Morris*, 9 Ves. 360. In respect to the application of the doctrine of ademption, a distinction prevails between a demonstrative and a specific legacy. In the former case, the destruction of the fund or security will not operate as an ademption of the legacy. Thus, where the bequest was of 500*l.* "we have now out upon mortgage," which the testator afterwards called in, *Sir William Grant* held that this was not an ademption, the characteristic of the legacy not depending on the particular security on which the money might be placed, which the testator considered as merely accidental, and only mentioned as descriptive of the present situation of the money. *Le Grice v. Finch*, 3 Meriv. 50. See also *Attorney General v. Parkin*, Ambl. 566. But if the bequest assume the character of a specific bequest, as, if the security or the fund itself be specifically given, the legacy will fail if the security or fund does not exist at the testator's death. Therefore, where there was a bequest of two policies of insurance upon life, and the amount of the policies was received by the testator, the legacy was held to be adeemed. *Barker v. Rayner*, 5 Madd. 208. In the earlier cases a distinction was taken, on the question of ademption, between voluntary and compulsory payments, and proceeding upon the *animus adimendi*, it was held, that where a testator received a debt which he had specifically bequeathed without solicitation, and *ex mero motu* of the debtor, it was no ademption; but that where it was paid to him by the debtor, upon his application, or by compulsion, it was an ademption. *Partridge v. Partridge*, For. 228. *Crockatt v. Crockatt*, 2 P. Wms. 164. *Rider v. Wager*, Ib. 328. In the case of *Ashburner v. Maguire*, Ambl. 401., Lord Thurlow entered very fully into the consideration of all the cases which are to be found on this subject; and in that case, and also in *Stanley v. Potter*, 2 Cox, 180., he altogether repudiated the principle of the *animus adimendi*, as tending to inexplicable confusion; and held that when it was once determined that the legacy of a debt was specific and not demonstrative, that the only safe and clear way was to adhere to the plain rule; that there is an end of a specific gift, if the specific thing do not exist at the testator's death. It may be questionable from the cases of *Coleman v. Coleman*, 2 Ves. jun. 639. and

legacy. As there is a benefit one way to a specific legatee, that he shall not contribute, so there is a hazard the other way; for instance, if such specific legacy (being a lease) be evicted, or (being goods) be lost or burnt, or (being a debt) be lost by the insolvency of the debtor, in all these cases such specific legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them^f.

Legatees on the bequest of part of a specific chattel, though not liable to abatement with general legatees, yet must abate proportionably among themselves upon deficiency of specific things bequeathed, or deficiency of general assets for payment of debts. So, specific legatees of distinct chattels shall abate proportionably on deficiency of general assets^g. — Where the residue is not beyond the value of the legacies, the residuary legatee takes nothing. But in a case under special circumstances, where a testator meant the surplus as a legacy to his son, on a deficiency of assets, he was allowed to come in with the other legatees^h; yet of this case Lord Thurlow has expressed a disapprobation, and said, that in such a case, if the testator did not leave a residue beyond the value of the legacies, the residuary legatee takes nothing; so where the pecuniary legatees abate among themselves, the residuary legatee takes nothingⁱ (11).

^f *Hinton v. Pinke*, 1 P. Will. 540.

^h *Dyose v. Dyose*, 1 P. Will. 305.

^g 1 P. Will. 540. note 1. 4th edit.

ⁱ *Fonnereau v. Poyntz*, 1 Bro. Cha. Rep. 478.

Roberts v. Pocock, 4 Ves. 150. whether Lord Rosslyn fully adopted the principle of Lord Thurlow, but from the cases of *Fryer v. Morris*, 9 Ves. 360., and *Le Grice v. Finch*, 3 Meriv. 51. it may be inferred that Sir William Grant considered the law to be so settled. It seems, therefore, to be now an established principle, that in the case of a specific gift, the court is only to enquire whether the specific thing remains at the death of the testator, and cannot enter into the consideration, whether it has or not ceased to exist, by an intention to adeem on the part of the testator. *Barker v. Rayner*, 5 Madd. 208. See *Graves v. Hughes*, 4 Madd. 381.

(11) See also *Page v. Leapingwell*, 18 Ves. 466., where Sir William Grant made a similar observation.

Hence it may be perceived that, if there are not assets to pay the testator's debts, the legatees take nothing. But now we shall advert to what has lately been mentioned concerning lands subjected to the payment of debts, in which case a legatee shall stand in the place of a simple contract creditor, who hath been satisfied out of personal assets^k. But where one seised in fee owes debts by bond, and devises lands to the heir in tail, and gives several legacies, after which he dies, leaving the heir his executor; the heir with the personal estate pays off the bond debts, by which means there are not assets to pay the legacies; the legatees bring their bill, praying to stand in the place of the bond creditors, and to be paid out of the land devised to the eldest son. The court held the legatees to be without remedy, the land being (specifically) devised in tail to the heir; otherwise had the land descended to such heir in fee^l. So though the court will marshall the assets in favour of a simple contract creditor, and (generally speaking) in favour of a legatee, yet where such legatee is a pecuniary one, he will not be relieved by being permitted to come in the place of bond creditors upon the land in the hands of a devisee thereof^m.

A specific legacy is not to be broken into in order to make good a pecuniary one; much less shall pecuniary legatees, on a deficiency of assets, have any remedy for their legacies against a devisee of land; as was held in the two last above cited cases, which are recognised in a later case, wherein it was held that legatees are not entitled to stand in the place of bond creditors, and to have satisfaction out of real estate devised. And as to pecuniary legatees, it was said, there is no reason that a pecuniary legatee should break in upon the devisee. The justice would be for all to abate in proportion, but no such decree was ever made. It might be, that the value of the whole devise might be taken to satisfy pecuniary legacies.—But here it was held, that the legatees have a right to stand in the place of mortgagees, and to have satisfaction out of the real estate for what they shall have ex-

^k Page 310.

Burt, 1 P. Will. 201. 678.

^l *Herne v. Meyrick*, *Clifton v.*

^m *Ibid.* 204.

hausted of the personal : and it was said, there is a difference as to the bond debt. A mere specialty debt is no lien on land in the hands of the obligor, his heir, or devisee. A mortgage is a lien and an estate in the land. By devise of lands mortgaged, nothing passes in point of law, but the equity of redemption, if it is a mortgage in fee ; if for years, the reversion and equity of redemption passes. — The determination in *Clifton v. Burt* is right, and founded on its not being a mortgage ^a.

The court will marshal assets in favour of legatees, where specialty creditors exhaust, as against the heir in respect of estate descending ; and against a residuary devisee, but not against a specific devisee. — If one devises his real estate, and gives general pecuniary legacies not charged on the real estate, and dies leaving specialty debts, and the specialty creditors exhaust the personal estate, the legatees shall not stand in their place and come on the realty, because it was the intention of the testator that the devisee should have the real estate, as well as the legatees be paid ; and therefore, if one has only personal estate, and gives specific as well as general legacies ; if the creditors exhaust the general assets, yet the general legatees shall not stand in their place, and come upon the specific legacies. But if one indebted by simple contract has lands and personal estate, and begins his will by charging all his estate with payment of his debts (12) ; and then, after giving general legacies,

^a *Forrester v. Lord Leigh*, Amb. Rep. 171.

(12) It has in many cases been made a subject of contention, what words will amount to a charge of debts upon real estate. But it may be collected from the authorities, that wherever the testator has expressed a general and a primary purpose, that the payment of his debts and legacies shall precede the disposition which he has made of his real estate, the debts and legacies will be considered as being a charge upon it. And in doubtful cases the court inclines to the construction in favour of creditors, rather than against them. *Noel v. Weston*, 2 Ves. & Bea. 269. *Clifford v. Lewis*, 6 Madd. 33.

devises his real estate by way of specific devise, and the simple contract creditors exhaust the personal estate, the general legatees shall stand in their place, and come on the real^o.

And where an additional legacy was given to A, charged on the real and personal estate, and the other legacies not charged on the real estate. A's legacy exhausts the personal estate; it was held that the other legatees shall have satisfaction for so much out of the real estate. As, where W. Roberts by will gave several legacies to the defendant and others, and devised his real estates in trust for two persons who were his heirs at law, who by descent took as coparceners; and by a codicil he gave, over and besides the legacy in his will, another legacy of 3000*l.* to defendant, which he directed his executrix and trustees to pay, and thereby charged all his real and personal estate whatsoever with payment thereof. The personal estate was exhausted in payment of the 3000*l.* legacy. — Lord Chancellor. In the present case there are general pecuniary legacies, and in a subsequent clause (considering the codicil as such) a pecuniary legacy is given of 3000*l.* which he charges on both his estates. *Query*, Whether the other legatees shall stand in the place of the 3000*l.* legatee? — Am of opinion they ought, and that it was the testator's intention. He has expressly charged his lands with the 3000*l.*, and I do not see how this case differs from the case put at the bar. One indebted by simple contract has lands and personal estate, and begins his will by charging all his estate with payment of his debts, and then after giving general legacies, devises his real estate by way of specific devise. The simple contract creditors exhaust the personal estate; shall not the general legatees stand in their place, and come on the real? The court will order it so that every body may have satisfaction, and the whole intention complied with. By the words "over and above," in the codicil, the testator meant the defendant should have the legacy given her by the will.

^o *Hanby v. Roberts*, Amb. Rep. 127.

Suppose the 3000*l.* had exhausted all the personalty, should she not have that small legacy in the will out of the realty? She certainly would ^p.

Testator by his will ordered trustees to possess themselves of his estates and *substance*, and to pay debts. This was held a charge of the debts on the real estate. And the assets shall be marshalled for the legatees, to let them in so far as the personal estate has paid towards the debts ^q.

And where Tempest Hay by will dated 1762, after directing all his debts and funeral expences to be paid, devised all his real estate to trustees, to the use of his son for life, remainder to his first and other sons by any future marriage in tail male, with remainder to daughters as tenants in common; and the testator did declare, that if his said son should intermarry with any woman related to his then present wife, the uses limited, so far as the same should relate to the issue of such future marriage, should cease and determine; and the trustees should stand seised of all the premises, to the use of all and every the children of testator's brother John Hay, deceased, who should be living at the time of his death, share and share alike; and in case all the children of testator's said brother should happen to die in his the said testator's lifetime, or before his death, without issue, he gave and devised all his real estates unto his own right heirs, that is, such as should be no way related to M. A. his son's then wife: and the testator after giving divers legacies to persons named in the will, directed the residue of his personal estate not therein before disposed of, to be laid out in government securities, in the names of his executors, to be settled and applied to the same use as his real estates were therein before limited to: testator died, leaving issue his son Thomas, and leaving several of the defendants the children of his brother John.

By the decree, on hearing of the cause the will was established, and it was among other things ordered that the personal estate of the testator should be applied in payment of

^p Amb. Rep. 128.

^q *Foster v. Cooke*, 3 Bro. Cha. Rep. 347.

his debts, funeral expences, and legacies, in a course of administration ; and that, in case the testator's personal estate should not be sufficient to pay his debts, funeral expences, and legacies, his honour declared the real-estate was subjected by the will, to the amount of debts and funeral expences ; that the real estate, or a sufficient part thereof, should be sold, and the money arising from the sale be applied in making good the deficiencies : and in case any of the creditors had received any thing out of the testator's personal estate towards satisfaction of their demands, then they were not to receive any part of the money arising from the said sale, till the other creditors were paid up equal with them. — The estate had been sold ; and the personal estate not being sufficient for payment of debts and legacies, they were ordered to be paid out of the money produced by the sale of the real estate^r.

And where John Taylor, by will dated 2d January, 1788, directed all his just debts and funeral expences to be paid out of his personal estate ; and if his personal estate should not be sufficient, he charged his real estate with so much thereof as his personal estate would not extend to pay ; and then devised his real estate to trustees, subject to annuities and other payments, to the use of the plaintiff for life, with remainders over, and gave several legacies ; the personal estate proving deficient, it was declared that the legatees were entitled to stand in the place of the creditors, for so much of the personal estate as had been exhausted by them in payment of their debts^s.

Thus having proceeded, we shall now attend to *lapsed* and *vested* legacies, as that where any legacy or personal estate is given to one, his executors, administrators, and assigns, or any real estate to one and his heirs : if the legatee or devisee die before the testator, what was given them will be *lapsed*, the same as if a legacy, or if real estate should be given to one person absolutely, without any mention of any other person to whom it should go in case of his death ; as

^r *Bradford v. Foley*, 3 Bro. Cha. Rep. 351. n.

^s *Webster v. Alsop*, 3 Bro. Cha. Rep. 351. n.

here on the death of the person to whom the personal estate is given, if he die before the testator, the legacy will undoubtedly be *lapsed*¹, and sink into the *residuum* of the testator's personal estate (13); and if wanted for paying debts or other legacies, must be applied by the executor for that purpose; if not wanted, must go to the residuary legatee, if any one is appointed; and if no residuary legatee is appointed, then the same shall be disposed of in manner heretofore shewn². And, as to the real estate, it will be as if no devise thereof had been made, and the same will descend to the testator's heir at law.

So where the devise was to A and his issue, remainder to B and his issue, remainder to the heirs of A. A dies in the lifetime of the testator, without issue. B dies also in the lifetime of the testator, leaving a daughter, who was also heir of A. Held by Parker chief justice, and the whole court, that the daughter took nothing, either as the issue of B or the heir of A, though it was argued, that, in the event which had happened, she might take by purchase under the description of A's heir³. And if there is a devise to A and the heirs of his body, and *for want of such issue* to B, and A

¹ *Maybank & Brooks*, 1 Brown's Cha. Rep. 84. In this case it was contended for parol evidence to be let in to prove, that the testator knew at the time of making the will that

the legatee was dead; but it could not be admitted.

² Page 214.

³ Doug. Rep. 339. n. 2d edit.

(13) A residuary bequest differs from a specific or pecuniary legacy, in regard to its disposition after it has lapsed. Where a specific or pecuniary legacy is revoked, or from whatever cause it fails, it becomes a part of the residue for the benefit of the residuary legatee; but if a gift of a portion of the residue fails, it will not accrue in augmentation of the remaining portions, as a residue of residue, but instead of resuming the nature of residue, will devolve as undisposed of. For residue means only all of which no effectual disposition is made by the will, other than the residuary clause; but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative. See *Creswell v. Cheslyn*, 2 Eden, 123. *Skrymsner v. Northcote*, 1 Swanst. 566.

dies before the testator, leaving issue, such issue shall take nothing, and the limitation to B shall not be construed an executory devise, but shall vest in possession, as an immediate estate ¹.

But where the testator ordered the interest of residue to be paid to his five sisters for and during the term of their natural lives, and in case any of his sisters should die leaving issue, that the trustees, "do and shall pay, assign, and transfer the share or proportion of the said *residuum*, to which his sisters so-deceased was intitled, at or before the time of her decease, to receive the interest and dividends thereon, unto and amongst all and every such child or children of such deceased sister equally between them, share and share alike, at their respective ages of twenty-one years." — The testator died, leaving four of his sisters surviving him. — One of his sisters died in his lifetime; and two of her children who had attained their ages of twenty-one years, and were the only other next of kin to the testator, filed their bill against the executors, the surviving sisters, their husbands and children, claiming to be entitled to one-fifth of the *residuum* of the testator's personal estate, as children of the deceased sister, and insisting, if they were not so, that the testator had died intestate, as to that one-fifth of his personal estate. — It was contended for the defendants, that in order to take, the children must be children of such sisters as would be intitled to take the interest and dividends during their lives. But, Lord Chancellor thought the plaintiffs were intitled to this as an executory devise, and that, in a will so loosely drawn, it was more probable that was the testator's intent than the contrary ².

And where the interest of a sum of money was given to A for life; and after her decease the principal to the son

¹ Thus it was held by the court of K. B. in *Hodgson v. Ambrose*, Doug. Rep. 357. 2d edit. And that the case of *Coulson v. Coulson*, (2 Atk. 246.) has been so long con-

sidered as law, that the precise question in that case ought not now to be litigated.

² *Rheeder v. Owen*, 3 Bro. Cha. Rep. 240.

and daughter of A by the former husband Mr. W. equally between them, share and share alike, but if either of them should die before the decease of their mother, the whole to the survivor. — The daughter and son both died in the lifetime of their mother, and the son surviving the daughter, it was held the legacy vested in him, and on his death went to his administrator^a. — A bequest of residue was to certain persons equally to be divided between them, share and share alike, and testatrix directed, that in case of the death of any of them (the said residuary legatees) before her, then the share or shares of him, her, or them, so dying before her, should go to, be had and received by his or her legal representatives. One of the persons died in testatrix's lifetime, and it was held his next of kin shall take his share of the residue^b.

If a *contingent* legacy, or legacy depending upon some event that may or may not happen, be left to any one, this may become a *lapsed* legacy, although the legatee survive the testator, as if a man devise to his daughter 100*l.* when she shall be married, or to his son when he attains his full age; or if he attains the age of twenty-one, and they die before that time, their legacies are lapsed(14); but it is

^a *Sourfield v. Howes*, 3 Bro. Cha. Rep. 90,

^b *Bridge v. Abbot*, 3 Bro. Cha. Rep. 224,

(14) But although in the instances enumerated, there is no gift of the legacy prior to the time appointed for payment, so as to vest it in interest before that period, yet if in any of those instances the testator had given the *intermediate interest* to the legatee, or directed it to be applied for his benefit, that circumstance would have vested the legacy; and the principle upon which the legacy would thereby have become vested seems to be this, that as no interest could accrue to the legatee previously to the time appointed for payment of the principal, the testator's intention by giving interest must be presumed to have been to give such principal in all events to the legatee, and to have allowed him intermediate interest as a recompense for the forbearance of the capital. *Fonereau v. Fonereau*, 3 Atk. 645. *Walcott v. Hall*, 2 Bro. C. C. 305. *Leake v. Robinson*,

otherwise, if the devise was to them *to be paid* at their ages of twenty-one^c; for a legacy to one, to be paid *when* he attains the age of twenty-one years is a *vested* legacy; an interest which commences *in presenti*, or immediately on the death of the testator, although it be *solvendum in futuro*, or to be paid in future; and if the legatee survive the testator, although he die before that age, his representatives shall receive the legacy out of the testator's personal estate, at the same time it would have become payable if the legatee had lived. This distinction is borrowed from the civil law; and its adoption in the temporal courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable there should be a conformity in their determinations, and that the subject should have the same measure of justice in whatever court he sued. But if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir; for with regard to devises affecting real estate, the ecclesiastical court hath no concurrent jurisdiction^d.—In a late case where legacies were given to infants out of land (charged generally with debts) payable at twenty-one, with interest at three *per cent.* One of the infants dying before that age, Sir Lloyd Kenyon, after great consideration, decreed that the legacy lapsed^e.

To determine the vesting of contingent legacies bequeathed in a variety of forms by different testators, such a number of suits have been commenced and prosecuted in the court of chancery, even within this last century, it would be endless to attempt to enter upon all the particular

^c Law of Test. 234.

^d 2 Black. Com. 513.

^e *Gawler v. Standewicke*, 1 Bro. Cha. Rep. 106. n. (8.C. 2 Cox, 15.)

2 Meriv. 386. The same presumption, however, would not be afforded by a direction for maintenance out of the interest. *Pulsford v. Hunter*, 3 Bro. C. C. 416.

subtleties and refinements into which this doctrine has been spun out; we must therefore refer to the adjudications that have been hereon, the cases whereof are collected by Mr. Cox ^f(15).

Concerning legacies extinguished, by means of a fortune given after the will was made: where one of two legacies given to the same person by the same will, may be a revocation of one of them: where a legacy given by a debtor to his creditor may be presumed a satisfaction of the debt: and a legacy being adeemed by testator's selling stock, specifically bequeathed, we have heretofore treated in different parts of our work, which may readily be discovered by turning to legacies in the index.

As to interest due on *contingent* legacies, and legacies payable to children when they attain twenty-one years. By Lord Chancellor Hardwicke, in a case before the court of chancery: cases of this kind, how far a legatee, who is not entitled to the payment of the legacy immediately, shall have interest in the meantime, depend upon particular circumstances. Some upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; so that there is hardly one case which can be cited that is a precedent for another: some things are certain in these cases, as where a legacy is given generally at marriage, or at twenty-one; there the vesting and time of payment are the same, and it shall not vest till marriage or twenty-one. To go one step farther, where a legacy is actually vested, as being given to an infant payable at twenty-one; yet it shall not carry interest, unless something is said in the will that shews the testator's intention to give interest in the meantime. But all these cases are subject to this exception; if it is in the case of a child, then let a testator give it how he will, either at twenty-one, or at marriage, or payable at twenty-one, or at marriage, and

^f 2 P. Will. 612. note 1. 4th edit.

(15) See also Roper on Legacies, vol. i. p. 151—253. and p. 433—455.

the child has no other provision, the court will give interest by way of maintenance; for they will not presume the father so unnatural as to leave the child destitute ^s.

In the case of *Chaworth and Hooper*, where there was a devise of the residue to an infant payable at twenty-one, with a remainder over in case of her dying under that age. The question was, Whether, as the infant died under age, the interest, from the death of the testator to that of the infant, should go to the infant's representative, or to the remainder-man, that is, the person to whom devised, in case of the infant's dying under twenty-one? By Mr. Baron Eyre, for Lord Chancellor; The whole residue is here given to the infant: what is to become of the produce? Where would the use be if it was a specific thing, or the rents if it was land? — The interest is the natural produce. It is not a charge upon any body. The produce must go to the person who has the thing liable to be divested; when divested it must from that moment go to the person who comes in; and decreed accordingly ^h.

It hath been determined, that where a legacy is devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the first year after the testator's death; but if the legatee be of full age, he shall only have interest from the time of his demand after the year; for where no time of payment is set, it is not payable but upon demand, and the legatee shall not have interest but from the time of his demand, except he be an infant, to whom *laches* or negligence is never imputed. But, where a certain legacy is left, payable at a day certain, it must be paid with interest from that day ⁱ.

Where a legacy is given charged on lands or money in the funds, which yield an immediate profit, and there is no day of payment mentioned, the legacy shall carry interest from the testator's death. But where it is charged on the personal estate, which cannot be immediately got in, there the legacy bears interest only from the end of the year after

^s *Heath and Perry*, 3 Atk. 101.

ⁱ *Prec. Cha.* 161. 2 *Salk.* 415.

^h 1 *Brown's Cha. Rep.* 82.

the death of the testator^{*}. — If a legacy be brought into court, and the legatee hath notice of it, so that it is his fault not to pray to have it, or that the money should be put out, in such case he shall lose the interest from the time the money was brought into court, unless it be put out by the court, which if it is, the legatee shall have the interest it yields¹ (16).

^{*} 2 P. Will. 26, 27.

¹ *Ibid.* 27.

(16) The old rule that the payment of interest on a legacy should depend on the circumstance of the fund out of which it is to be paid being productive or barren has been exploded; and it is now established, that a pecuniary legacy does not bear interest until the expiration of a year after the death of the testator, although he should have left funded property only. *Gibson v. Bott*, 7 Ves. 96. The rule is founded on this reason, that interest is given for the non-payment of the legacy when due, and that a legacy for the payment of which no other period is assigned by the will, is not due until the end of the year. But this general rule has several exceptions. The first exception is in the case of a specific legacy. That being an immediate gift of the fund which is severed from the bulk of the estate, is considered as being specifically appropriated for the benefit of the legatee, and consequently it carries with it all its produce. *Barrington v. Tristram*, 6 Ves. 345. Another exception is a legacy to an infant child of the testator. The foundations of that exception are, the natural obligation of the parent to provide for his child, and the incompetence of the child to give a discharge for the principal. The court, therefore, concludes that the parent has postponed payment of the principal, in respect only of this inability to give a discharge, and infers an intention that interest shall be paid immediately. *Carey v. Askew*, 1 Cox, 243. *Cricket v. Dolby*, 3 Ves. 10. *Chambers v. Goldwin*, 11 Ves. 1. *Raven v. Waite*, 1 Swanst. 557. This exception has been extended to infants towards whom the testator has placed himself *in loco parentis*, *Acherley v. Wheeler*, 3 Ves. 10.; and to illegitimate orphan grandchildren, *Hill v. Hill*, 3 Ves. & Bea. 183.; and it has also been applied where circumstances exist from which the court infers an intention that the legacy shall be applicable to the support of an infant legatee. *Beckford v. Tobin*, 1 Ves. sen. 308. *Tyrrell v. Tyrrell*, 4 Ves. 1. *Lambert v. Parker*, Coop. 143. *Pett v. Fellows*, 1 Swanst. 561. n. But the case of illegitimate infant children does not

Before an executor or administrator pays a legacy, for which he has one year allowed after the testator's death, where there is no time limited for paying it, as we have lately seen^m; he should first observe what debts are unpaid, and how far his assets, or what he has of the testator's estate will extend to pay them (17); secondly, what general or pecuniary legacies are to be paid, and what he has to pay them with, and whether it will be necessary for any abatement, specific legacies not being to abate if there is enough besides to pay the debtsⁿ; and herein it behoves the executor to be careful, the rule being, that where an executor pays a legacy, the presumption is, he hath sufficient to pay all legacies,

^m Page 315.ⁿ Mentioned page 316.

fall within this exception, *Lowndes v. Lowndes*, 15 Ves. 301.; nor does that of a wife, *Stent v. Robinson*, 12 Ves. 461.; nor the case of a nephew, 3 Ves. 12.; and the exception will never be extended in favor of an adult legatee. *Raven v. Waite*, 1 Swanst. 553. And where a father makes an express provision for the maintenance of his child out of another fund, interest cannot be claimed upon a legacy until it becomes payable. *Wynch v. Wynch*, 1 Cox, 433. A third exception out of the general rule is where the legacy, whether vested or not, is payable at a particular time, and the will is silent in respect to interest; in that case interest shall not commence until the time of payment: for as interest is given only for delay of payment, it follows that before the day of payment arrives, no interest can accrue to the legatee. *Tyrrell v. Tyrrell*, *supra*. *Descrampes v. Tomkins*, 4 Bro. C. C. 150. n. Where an annuity is given by will, the first payment is to be made at the end of the first year after the testator's death, because it commences immediately upon the happening of that event. *Gibson v. Bott*, 7 Ves. 96.

(17) In a late case a question arose whether an executor could safely make payment of legacies, or deliver over a residue while there was an outstanding covenant of his testator which had not been and never might be broken; and Sir William Grant, on a review of the authorities, ordered the funds to be made over to the parties on their giving a sufficient indemnity to the executor to be approved by the master. *Simmons v. Bolland*, 3 Meriv. 547.

which the court will oblige him if solvent to pay^o (18). If the executor hath made an inventory in such manner as heretofore shewn^p, and there are not effects sufficient to pay all the legacies, it seems, that before he hath paid any legacy, he may retain a rateable part or proportionable deduction from the general legacies, in order to pay them proportionably; and herein he cannot prefer himself, as hath been mentioned &c. — How the executor is to pay the duty for the legacy he discharges, will be shewn in the appendix.

With respect to paying legacies to infants: in a case where the testatrix gave the bulk of her fortune to her executor, upon condition that he paid three several legacies of 100*l.* into the hands of three children, within a year after her death, which the executor accordingly paid; one of the children being then sixteen years old, another fourteen, and the youngest nine. And after this the children brought their bill in chancery against the executor to be paid their legacies, suggesting that the money paid during their infancy had been embezzled by their father, who was now insolvent, and that this was a fraudulent payment to the father. The executor, in his answer to the bill, denies that he ever knew of this money coming to the father's hands. By Lord Chancellor Hardwicke: In cases where the legacies have been very small, the payment thereof into the hands of minors have been allowed by this court: but in this case, notwithstanding the sum is above 100*l.*, I will not strain the rules of this court to make an executor pay it over again. Yet, after his lordship had looked into the cases, the next day he said that he found this a very doubtful point; and would not determine it without taking time to consider thereon, unless the executor would agree to give the children something; and upon

^o 2 Ves. 194.

^q Page 312.

^p Page 44.

(18) And an executor who has paid legacies stands in a situation in which it is not competent to him in equity to allege that debts are unpaid. *Freeman v. Fairlie*, 3 Meriv. 38.

the recommendation of the court, he agrees to give them 50*l.* to be divided among them, and each side were to abide by their costs: and it was made part of the decree that the 50*l.* was paid by the consent of the parties ¹.

If a legacy, when due, be paid to the father of an infant, it is no good payment, and the executor may be obliged in equity to pay it over again; as where a legacy of 100*l.* was devised to an infant of about ten years of age, and the executor paid it to the father and took his receipt for it; and during fourteen or fifteen years afterwards the son rested satisfied, on the father's promising to give him the legacy; yet at length the father and son being joint traders together, became bankrupts, and this legacy of 100*l.* was, amongst other things, assigned by the commissioners for the benefit of the creditors; whereupon the assignee brought a bill in the court of chancery against the executor for an account and payment thereof. The defendant insisted on the extreme hardship of his case if he should be obliged to pay it over again; and that formerly payment to the father was allowed to be good. But the Lord Chancellor said, he thought the rule of this court, in not suffering parents to receive their children's legacies, was founded on very good reason; and therefore, to discountenance and deter others from paying such legacies to the parents, he decreed for the plaintiff against the executor. And where a legacy of 125*l.* was

¹ *Philips v. Paget*, 2 Atk. 80.

² *Dagley v. Tolferry*, 4 Bacon's Abr. 429. Where a legacy of 100*l.* was given to A to be equally divided between himself and his family, and payment thereof made to A, whose children afterwards filed a bill against the executors for the legacy,

the same was held to be well paid to A, and the bill was dismissed. *Cooper v. Thornton*, 3 Bro. Cha. Rep. 96. (19). In the decision of this case the master of the rolls investigated the doctrine of the two last cited cases, and acquiesced therewith.

(19) And where B bequeathed 2000*l.* reduced annuities to C for life, with remainder to C's daughter, for her and her children's use, on the death of C, Sir William Grant held that her daughter was entitled to a transfer of the stock and payment of the dividends which had accrued. *Robinson v. Tickell*, 8 Ves. 142. See also *Hammond v. Nearne*, 1 Swanst. 35. *Curtis v. Rippon*, 5 Madd. 434.

given to an infant, being but ten years old, and the same was paid to his father, who died insolvent, and of whom the executor had taken a bond to be saved harmless; it was decreed that the executor should pay the legacy over again, for he had paid it at his own peril by taking the bond ^t.

If a legacy be left to an infant under seven years of age, the father, or next of kin, on applying to the spiritual court, are usually assigned curators, and thereby enabled to sue for the legacy; and if the minor is above seven years of age, he is to choose a curator, and request the judge of the court to assign him. But although such curator may be assigned, it is not advisable for the executor to pay the legacy until suit

^t 1 Cha. Ca. 245. Where a legacy is given to a child by a relation, a father cannot make use of it in the maintenance of such child, but must provide for him out of his own pocket; nor can he set him out in

the world, or put him out an apprentice, or clerk, with the money arising from the legacy, and if he does it, he shall not be allowed it. *Darley v. Darley*, 3 Atk. 399. (20).

(20) This rule is not rigidly adhered to. In cases of necessity, arising from the distressed and embarrassed circumstances of the father, the interest of the legacy will be applied towards the maintenance of the child. *Andrews v. Partington*, 3 Bro. C.C. 60. S. C. 2 Cox, 223. 15 Ves. 122. So where the will has contained an express direction for maintenance of the legatees out of the interest of the legacies, and there have been other children, not the objects of the testator's bounty, such maintenance has been ordered, on the ground of the father's not being of ability to educate the favored children in a manner suitable to their fortunes. *Hoste v. Pratt*, 3 Ves. 730. *Mundy v. Earl Howe*, 4 Bro. C.C. 223. And in a late case where the father's income was 6000*l.* a year, but his expenditure was correspondent, Sir *William Grant*, on the application of the father, ordered maintenance for the children whose expectations were considerable. *Jervoise v. Silk*, Coop. 52. And whenever the father is not of ability, the court will allow maintenance for the children, although the mother has a competent separate estate, because she is not under a legal obligation to maintain them. *Haley v. Bannister*, 4 Madd. 275. See the cases on the subject of maintenance collected by Mr. *Eden*, in his note to *Andrews v. Partington*, 3 Bro. C.C. 60. See also *Marshall v. Holloway*, 2 Swanst. 436.

hath been commenced against him ; for then he may pay it into the spiritual court if the suit be there commenced, and he be thereunto cited ; and thereby he will be discharged^u. And when suits have been commenced in the court of chancery, by guardians for infants' legacies, and executors pursuant thereto have paid the money into court, they have been indemnified against any future claim.

In several cases relative to paying legacies to infants, it hath been observed that, where the legacies were very small, the payment thereof into the hands of infants hath been allowed ; and in a cause before the court of exchequer, it was said by the chief baron, that a legacy might be safely paid into the hands of an infant having proper evidence of the payment ; as in *Wentworth's Office of Executors*^w ; where it is laid down, that if the infant be fourteen years of age, the payment of a legacy to him will stand good, and if the executor have proof of the payment, he is well enough acquitted from any second payment ; and it was thought by Mr. Wentworth, that on demand and acquittance tendered, an executor would be safe in paying a legacy to an infant of tender years in the presence of his guardian^x (21).

^u Oughton's *Ordo Judiciorum*,
358.

^w Bunb. 240.

^x Went. Off. Exec. 219, 220.

(21) An executor may discharge himself from all responsibility on this head by virtue of the statute 36 Geo. 3. c. 52. s. 32. by which it is enacted, that where by reason of the infancy, or absence beyond the seas of any legatee, the executor cannot pay a legacy chargeable with duty by virtue of that act, (that is to say) given by any will or testamentary instrument of any person who shall die after the passing of that act, it shall be lawful for him to pay such legacy, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the accountant-general of the court of chancery, to be placed to the account of the legatee, for payment of which the accountant-general shall give his certificate on production of the certificate of the commissioners of stamps, that the duty thereon hath been duly paid ;

As to paying legacies to married women ; where a legacy of 100*l.* being devised by a father to his daughter, Elizabeth Palmer, a feme-covert, and after the testator's death, his executor pays it to Elizabeth, who spends it in her own maintenance ; her husband sues for it ; and the question was, Whether this was a good payment to the wife ? It being in proof that at the time of making the will, Palmer and his wife lived apart, and the husband did not allow her maintenance, and so it is a strong presumption that the devisor intended this for her separate use. By the Lord Keeper : If it had been so given in express terms, the payment to her had been good ; but as it is, the husband must have it decreed : he said, that in case where a tenant paid his rent to his landlady, not knowing that she was married, yet the husband made him pay it over again, and no help for it. — The will appointing the legacy to be paid within six months after the testator's decease ; the Lord Keeper likewise decreed the husband interest from that time *v.*

This being the effect of a bequest to a married woman, it is therefore usual to bequeath to some person in trust for her, or to herself, expressing it to be for her separate use, as thereby to prevent what is bequeathed being subject to the debts or control of her husband : as where a man devised his real estate to his daughter for her separate use, exclusive of her husband, to hold the same to her and her heirs, and that the husband should not be tenant by the curtesy, nor have the lands for his life, in case he survived his wife ; but that they should upon the wife's death go to her heirs. The

v. Palmer and Trevor, 1 Vern. 261. Law of Test. 250. 4 Burn's Eccl. Law, 319.

and such payment into the bank shall be a sufficient discharge for such legacy, which, when paid in, shall be laid out by the accountant-general in the purchase of 3 per cent. consolidated annuities ; which, with the dividends thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on application to the court of chancery by petition, or motion in a summary way.

husband becoming bankrupt, and the commissioners having assigned this estate to the assignees, the master of the rolls held, that this was a trust in the husband, and that there was no difference where the trust was created by the act of the party, and where by the act of law, and decreed a conveyance to be made by the assignees to the separate use of the wife¹.

Legacies, which, as will presently be seen, are suable for in chancery; if the husband and wife sue for a legacy given to the wife, the court will not compel the payment of it unless the husband make a settlement on the wife. And if husband become bankrupt, and the assignees sue for the wife's property in a court of equity, they must take it subject to the same equity of providing for the wife as the husband was subject to² (22).

¹ *Bennet v. Davis*, 2 P. Will. 316.

² 2 P. Will. 641. 3 P. Will. 12.
2 Atk. 430.

(22) The right which the wife has in a court of equity to claim a provision by way of settlement on herself and her children, out of a legacy bequeathed to her, is not, it seems, forfeited, though she elope from her husband and cohabit with another man. *Ball v. Montgomery*, 4 Bro. C. C. 339. But the wife may waive her equitable right to a provision; and if she consent in court that her husband shall receive the legacy, the court will direct it to be paid to him without requiring a settlement. *Dimmock v. Atkinson*, 3 Bro. C. C. 195. *Ellis v. Atkinson*, Ibid. 565. *Campbell v. French*, 3 Ves. 321. And in a late case, where money was bequeathed to be invested in an annuity for the life of the wife for her separate use, it was paid to the husband upon her consent taken in court. *Gullan v. Trimby*, 2 Jac. & Walk. 451. n. The court, however, will not receive her consent to bar her equity until her share is ascertained. *Spurling v. Rochfort*, 8 Ves. 164. *Jernegan v. Baxter*, 6 Madd. 32. Nor will they receive it unless a positive affidavit is made, that there has been no settlement made on the marriage, or, at least, that the wife's money has not been the object of it, *Minet v. Hyde*, 2 Bro. C. C. 663. *Hough v. Riley*, 2 Cox, 157. *Binford v. Bowden*, 1 Ves. jun. 512; for if it have been made the subject of a settlement, the court will not authorize the wife's

The spiritual court and court of chancery are the courts where legacies are sued for, the latter exercising a concurrent jurisdiction with the former, as incident to some other species of relief prayed by the complainant: as to compel the executor to account for the testator's effects, or to assent to the legacy or the like^b; and a bill may be filed in the court of exchequer for a legacy (23).

In some cases an executor may be compelled to give security for paying a legacy; as where 1000*l.* was devised to a person to be paid at the age of twenty-one years; and upon a bill exhibited against the executor, suggesting a devastavit, and praying that he might give security to pay the legacy when due, it was agreed accordingly^c. So where the testator devised 800*l.* to an infant, to be paid by his executor when the infant should attain the age of twenty-one years, and the infant by his guardian exhibited a bill that

^b 3 Black. Com. 98.

^c 1 Cha. Ca. 121.

departing with it to any person, though she should consent on her examination. *Fraser v. Baillie*, 1 Bro. C. C. 518. *Richards v. Chambers*, 10 Ves. 580. And it seems that a wife cannot by consent in court dispose in favour of her husband, of her reversionary interest in personalty bequeathed to her by will. *Pickard v. Roberts*, 3 Madd. 384. But see *Howard v. Damiani*, 2 Jac. & Walk. 458. n. As to the right of a wife to a provision out of her property as against the assignees of her husband, who has become a bankrupt, see *Whitm.* B. L. 127.

(23) An action will not lie at law against an executor for a pecuniary legacy payable out of the general funds of the testator, although assets be averred in the declaration; for the law will not, from the mere circumstance of the executor's being possessed of assets, imply a promise by him to pay such legacy. *Deeks v. Strutt*, 5 T. R. 690. *Mayor of Southampton v. Graves*, 8 T. R. 593. But where the bequest is of a specific chattel, and the executor assents to the bequest, the legal interest in the chattel vests absolutely in the legatee, and he may maintain an action at law for it, not only against a stranger, but against the executor. *Doe d. Lord Say & Sele v. Guy*, 3 East, 120.

the executor might give security for the payment of the money, it was accordingly decreed^d. And if a person possessed of a lease for years, devise that his executors, out of the profits thereof, shall pay to every one of his daughters 20*l.* at their full age; the executor may be sued in the spiritual court, to put in security to pay the legacies; and as this being to issue out of a chattel, no prohibition shall be granted^e. But where a legacy was given to a grand-daughter to be paid at twenty-one, or marriage: and if she died before either of those contingencies happened, then to go over to another: Lord Chancellor Hardwicke was of opinion, that as the legacy was devised over, nothing vested in the grand-daughter till one of the contingencies should happen: and therefore she was not entitled to have it secured^f.

However, this opinion of Lord Hardwicke is controverted in a late case, wherein a legacy of 5000*l.* being given to a female infant to be paid at twenty-one, or marriage, with interest at 4*l. per cent.* (but if she died before, to sink into the residue), it was ordered to be paid into the bank, in order to secure the legacy, and, if greater interest made, that it should be for the benefit of the child.— This cause was heard before the master of the rolls, and from his honor's decree there was an appeal to the lord chancellor.

Lord Chancellor. — The rule seems to have varied, different opinions having obtained at different times. Lord Hardwicke seems sometimes to have thought that money to be raised should not be raised till the time of payment. *Palmer and Mason*, 1 Atk. 505.— *Heath and Perry*, 3 Atk. 101., are both strong cases to shew his opinion to be so.— *Ferrand and Prentice*, before Sir Thomas Clarke: E. Prentice gave to the plaintiff 200*l.* to be paid ten years after her death. Upon bill filed to admit assets and give security, or to pay the money into the bank, it was decreed that the executor should do so, and that he should have the interest in the mean time, and at the end of the ten years the principal should be paid to the plaintiff. — *Walker and Cooke*: Le-

^d Law of Exec. 187.

^e 1 Roll's Abr. 285.

^f *Palmer v. Mason*, 1 Atk. 505.

gacy left to one to be paid at twenty-four, the plaintiff being twelve, the father filed a bill that the legacy might be invested in the funds; and decreed so, though it was declared, that the plaintiff was not entitled to the money till twenty-four.—*Johnson and De la Cruze*, 2000*l.* left to the testator's daughter at twenty-one, in default to her child; if no child, to Mills; bill to secure the fund. The court said a party so circumstanced might come here to have part of the personal estate secured for the legacy. In *Price and Taylor*, the same was said to be the course of the court. These cases go to prove, that where a legacy is to be so paid, it must be secured. I do not see a distinction as to its being contingent or merely future. If a legacy be payable at twenty-one, and the child dies, his executor cannot claim till the time when the child would have arrived at twenty-one, if the legacy does not bear interest; but if it be with interest he may claim immediately. If it bears a less interest than the utmost use, the executor hath a right to the use of the money paying the modified interest. *Chester and Painter*, 2 P. Wms., 335. Here I do not incline to alter the decree at the Rolls. The legacy is to the child, payable at twenty-one, with 4*l. per cent.* interest, which is the ordinary interest given by the court. If the interest were severed from the principal, I must order that to be secured. Giving interest even at 2*l. per cent.* vests the principal. Whether a legacy be payable at a fixed or a contingent future day, the effect is the same. I must secure the interest of the fund. If the interest was severed as an allowance, I must secure a fund equal to it. The Master of the Rolls has done right in ordering it to be laid out in the funds. But if it should produce more than 4*l. per cent.*, who is to have the surplus? I may order it to be paid to the executor.—But should it produce less, can I order the executor to make it up? No.—I think, therefore, the produce must be to the use of the infant.

Where the testator devised lands, and also ordered his personal estate to be laid out in land, and settled to uses

under which the defendant took an estate for life only, with remainder over, and appointed the plaintiff executor. The defendant possessed himself of the personal estate, and amongst other things, of securities for money. The plaintiff filed his bill, and the securities were ordered to be deposited. Some of the debtors being desirous of taking up their securities. — Motion was made to the court, on the part of the plaintiff, that the securities might be delivered up to him, in order to receive the monies secured by them; which was slightly opposed by defendant's counsel; but it was ordered and that the plaintiff should deposit the money paid in the bank ^h (24).

CHAPTER VI.

OF DEVISES AND BEQUESTS TO CHARITABLE USES.

CONCERNING devises and bequests to charitable uses, it was mentioned in a former chapter that, upon the construction of the statute 9 Geo. II. c. 36., a devise of land to trustees to be turned into money, and the money to be laid out in a charitable use, is not good; likewise, that a devise of a mortgage or term of years, to be laid out in a charity, is void; and if money be given to be laid out in lands, this is expressly

^h *Jones v. Jones*, 8 Bro. Cha. Rep. 80.

(24) According to the present practice, wherever a legacy is payable at a future period, the legatee, without any suggestion of an abuse of the trust by the executor, or that the fund is in danger, has a right to call upon the executor to have it divided from the bulk of the estate, and secured and appropriated for his benefit, as well where it is contingent as where it is vested. *Carey v. Askew*, 2 Bro. C. C. 58. S.C. 1 Cox, 241. *Cooper v. Douglas*, 2 Bro. C. C. 232. Annuity-tants are likewise entitled to the same equity, and to compel the executor to set apart a sufficient fund for the regular payment of their annuities. *Slanning v. Style*, 3 P. Wms. 335.

within the act; but that money given generally is not. On those points we shall now enlarge, and proceed to treat on such devises and bequests as are void and within the meaning of the statute, and such as are not: on money being devised to a charitable use; and conclude the chapter with treating on superstitious uses. And as most of the cases pertaining hereto are in the name of the Attorney General, we shall here, for the reader's information, drop a few words concerning the reason of this, which is, that the King, as *parens patriæ*, the parent of the country, has the general superintendence of all charities; wherefore it is always considered, that it is he who erects, the subject is only instrumental; and thus his Attorney General is the guardian of their rights, and relator of their claims, as well as their grievances, before the court of chancery; so that the usual course of application to the court to establish charities, is by bill of information in the name of the Attorney General (1).

As to such devises and bequests as are void and within the meaning of the statute. Where a devise was of lands to be sold and the residue of the money after payment of debts, &c. to a charity, it was held void by the statute*. So where there was a devise of lands to be sold, and part of the money arising by sale to go to *charitable uses*; and the residue of the money was given over; it was held that so much as was given in mortmain should lapse to the heir, and not go to the

* *Attorney General v. Lord Weymouth*, Ambler's Rep. 20.

(1) See 52 Geo. 3. c. 101., and 59 Geo. 3. c. 91., by which a summary remedy by petition signed by the Attorney or Solicitor General is, in certain cases, provided, in case of abuses of trusts created for charitable purposes. It seems that an order made upon a petition for relief under these statutes, which has not been signed by the Attorney or Solicitor General, is a nullity. *Attorney General v. Green*, 1 Jac. & Walk. 303. But to all suits for charitable funds, the Attorney General is a necessary party, except where a legacy is given to the officer of an established institution, as part of its general funds. *Wellbeloved v. Jones*, 1 Simons & Stuart, 40.

residuary legatee ^b (2). And a devise of residue of real and personal estate which consisted partly of a term, to charity, whether it be an old term or created *de novo*, anew, is held to be within the statute as to the term ^c. So a devise of residue of real and personal estate to a charity is held to be void ^d. And where testator possessed of a lease from the crown for years, of the right and power of laying chains in the river Thames, between Bushy's Hole and London-bridge, for mooring of ships, and of all profits to arise therefrom, by his will devised the same to charitable uses; it was held to be an interest in land, and within the statute of mortmain.—The Master of the Rolls held this lease from the crown to be a grant of the interest in the inheritance, and said, In *Attorney General v. Merricke*, [2 Vezey, 44.] Sir John Strange considered a mortgage in fee to be an interest in land ^e.

So where the devise was of the remainder of testator's effects, annuities, mortgages, &c. to a charity, the devise of the mortgages was held void: but that of his personal estate good (of which more particular mention will be made hereafter, in treating on devises and bequests that are not within the statute).—Master of the Rolls. The mortgages upon which the court has given judgment, were mortgages in fee, and this is only a mortgage for years. But that makes no difference; it is an interest in land (3). The case of the

^b *Grosvenor v. Hallum*, Amb. Rep. 644.

^d *Attorney General v. Tomlins*, Ibid. 216.

^c *Attorney General v. Greaves*, Ibid. 155.

^e *Negus v. Coulter*, Ibid. 367.

(2) And in a late case it was held, that money, produced by the sale of real estate bequeathed for charitable purposes, which were void by the statute, was a resulting trust for the heir. *Gibbs v. Rumsey*, 2 Ves. & Bea. 294. Where leasehold estate was bequeathed upon condition that the legatee should assign part of it to a charity, the Vice Chancellor held that the legatee took the whole discharged of the condition. *Poor v. Mial*, 6 Madd. 32.

(3) *Johnson v. Swann*, 3 Madd. 457. S. P. So a bequest of money to the minister of a chapel to be applied in the

Attorney General v. Graves [above cited] is an authority, that a term in gross is within the description of the statute^f. So where a devise was of freehold houses to eight poor persons of a parish, the gift was held to be void; and a personal fund attached to the freehold was also held void by the statute^g (4). And where a bequest was of 1000*l.* by sale

^f *Attorney General v. Caldwell*,
Ibid. 635.

^g *Attorney General v. Goulding*, 2
Bro. Cha. Rep. 428.

discharge of a mortgage upon it has been held to be void, it being a legacy to be laid out in the purchase of a charge or incumbrance affecting land. *Corbyn v. French*, 4 Ves. 418. And it has recently been determined, that if A. B., having several charges on lands, by his will directs his trustees and executors to convert all his property into ready money, and after payment of his debts, legacies, &c. to pay the residue to his wife C. B., and C. B. by her will, disposes of the residue of her personal estate to charities, but the charges on the lands are not paid off until after her death, the monies charged on the lands do not pass to the charities, but the bequest of C. B. is in that respect void. *Attorney-General v. Harley*, 5 Madd. 321.

(4) A bequest of personal property intended to be employed for charitable purposes upon premises, the devise of which is void by the statute of mortmain, must fail as being connected with and subsidiary to the void devise. *Attorney-General v. Whitchurch*, 3 Ves. 140. *Chapman v. Brown*, 8 Ves. 404. *Attorney-General v. Davies*, 9 Ves. 535. And it should seem, that although the devise of the land be revoked by a subsequent conveyance or surrender, yet the bequest of the money would not be good. *Attorney-General v. Hinxman*, 2 Jac. & Walk. 270. And so a bequest of the residue of a fund, after an indefinite gift to purposes that are void by the mortmain acts, is also void, from the impossibility of ascertaining what the residue would have been, if the prior purposes had been legal. *Chapman v. Brown*, and *Attorney-General v. Davies*, *supra*. But if the bequest of personal property can in any way be separated from a devise of the land, it will be applied according to the intention of the testator. *Attorney-General v. Hinxman*, *supra*. Therefore where a testator directed real estate to be sold, and the produce applied, with so much of the personal

of lands to be applied in water-works, for the use of the inhabitants of a town, it was held to be within the statute of mortmain as a public charitable use. — Lord Chancellor. Definition of a charity; a gift to a general public use, which extends to the poor as well as to the rich; many instances in the statute 43 Eliz. carrying this idea, as for building bridges, &c. The supplying of water is necessary as well as convenient for the poor and the rich^b.

Where testator by his will gave 200*l.* to the corporation of Queen Ann's bounty, to augment poor livings; and directed his executors to divide the residue of his personal estate into three parts, and to pay one-third part either to the corporation of Queen Ann's bounty, or the society for propagating the gospel; another third to his most necessitous relations, by his father's or mother's side; and the third to some public charity. The legacy to the corporation of Queen's Ann's bounty being held to be void, as by the rules of that institution it must be laid out in land, the third of the residue which was given to the same charity, or the society for propagating the gospel, was ordered on the same account to be paid to the latter [the relations], and the legacy of the other third to some public charity, was declared to be good, but that the executors ought to dispose of it under the eye of the court, and therefore were to propose a charity to the master¹ (5).

^b *Jones v. Williams*, Amb. Rep. 636. Where it is reported that, the bequest to the *most necessitous* 651.

¹ *Widmore v. Woodroffe*, 1 Bro. of my "relations," shall go accord- Cha. Rep. 13. n. S. C. Amb. Rep. ing to the statute of distributions.

estate as should be necessary, to secure an annuity to A, for life, and after his death to go to a charity, it was held that the charitable bequest was void as to that part of the purchase money of the annuity which was realized from the real estate, but that it was good for the rest of the sum which was required from the personal estate. *Waite v. Webb*, 6 Madd. 71.

(5) Where A, after bequeathing several annuities and some charitable legacies, gave the annuities upon the death

Testator by his will gave to trustees 500*l.* out of his personal estate upon trust to lay out part thereof in erecting a small school-house, and a little house adjoining for the master to live in; the whole purchase and building not to exceed 200*l.*; the remaining 300*l.* to be laid out in the purchase of land, or some *real security*, for the maintenance of the master. Lord Hardwicke held, that the word *real*, must be taken in its known real signification; therefore *that* 300*l.* legacy was void by the statute. But as to the 200*l.* if they could get a piece of ground by the gift or generosity of any person, not by purchase, they might be at liberty to apply to the court to lay out that 200*l.* in erecting a school-house thereon, but not to be laid out in land to build upon^k.

But this decision of Lord Hardwicke's concerning the 200*l.* is over-ruled, as is demonstrated in two later cases, which we shall proceed to relate.

Where a devise was of freehold and leasehold to be sold, and out of the money to buy land, and build an alms-house; the same was held void both as to buying land and building an alms-house. The case was as follows: Mary Parker by will devised all her freehold and leasehold estates to trustees, to sell, and out of the money to buy ground for an alms-house, in the parish of St. James in the city of Bristol; and likewise to erect an alms-house, and to lay out the residue of the money in land; and out of the rents and profits to pay certain stipends to twenty poor people, whom she had before appointed to be in the alms-houses: and until such purchases could be made, she directed the money to be laid out

^k *Attorney General v. Bowles*, 3 Atk. 806. 2 Ves. 547.—The determination was on the ground of the determination in *Vaughan and Farrer*, 2 Ves. 182.

of the annuitants to the society for increasing clergymen's livings in *England and Wales*, "for the perpetual purpose of "increasing their livings," it was held that as there was no other existing charity which could possibly meet the description in the will, the bequest was in effect a bequest to the governors of *Queen Ann's* bounty, and consequently was void. *Middleton v. Clitherow*, 3 Ves. 734.

on real or government securities. And in case this charity could not by law take place according to her directions, then she ordered trustees to lay out the money in such charitable uses, intents, and purposes, as near to her intention as could be, and the laws would permit. She then gave the residue of her estate to such uses, intents, and purposes, as aforesaid.

A decree having been made concerning the above mentioned estates, on a second hearing for further directions, the Master of the Rolls declared, That if the trustees could obtain a gift of a piece of ground in St. James's parish in Bristol, they might erect an alms-house upon it. — On appeal from the decree at the rolls; after argument at bar, and time for consideration, Lord Chancellor Henley delivered his opinion. — As to the freehold, there is no doubt; that must go to the heir at law. The leasehold, by reason of the devise being void, falls in the *residuum*. Quere. Whether the court shall marshal the assets: and by applying the leasehold, in the first place, to payment of debts, leave the other assets to be applied to the charity, and by that means do *per obliquum* what could not be done *per directum*. The old rule of marshalling was in case where a person had a double fund to resort to, and another person had a demand upon one of those funds, the court has turned the person having the double security upon that fund which was not liable to the other person's demand, in order to leave that fund open which was. That was attended with no inconvenience to any person, and it effectuated the intention: but this would be a method to elude the statute, which I will not do.

The decree for building an alms-house, if the trustees can get the ground given them, is founded upon precedent of the *Attorney General v. Bowles*, which is an authority for the Master of the Rolls. But I feel only one authority, that of the House of Lords, which is a superior court: no other authority has any influence on my judgment. That precedent has no influence on me; it is contrary to the spirit of the statute. In common sense, it is laying out money in land:

Thus having proceeded to treat on such devises and bequests as are void and within the meaning of the mortmain act, we shall now attend to such as are not void. And as in the latter part of the last above cited cases, it is mentioned, that a devise of money to build on land that is already in mortmain, is not within the statute; we shall proceed in shewing that, thus it was held where Dr. Conings, by will gave 200*l.* to the defendant *Stone*, to be laid out in repairing the free chapel of Grendon-Court, part of his estate.—Lord Chancellor was clear, that it was not within the words or meaning of the statute of mortmain. — The words of the statute are, “to be laid out *in purchase* of lands,” &c. — The meaning and intention of the act was, to prevent increase of lands, &c. in mortmain, beyond what was so at the time the act was made. This legacy is only to support that,

given liberty to erect an alms-house, in case any body would have given the land. See 2 Eden, 215. n. However the doctrine of Lord *Hardwicke* is not supported by modern adjudications; and it is now clearly settled, that a testator using the word “erect,” in reference to the endowment of a charitable institution, must *prima facie* be taken to mean that land is to be acquired for the purpose. He may indeed qualify that expression; and if, to use the words of Lord *Eldon*, “he manifests an intention that his purpose will be “sufficiently answered, by the hiring or begging of lands,” it will not be intended that a purchase is to be made. *Attorney-General v. Parsons*, 8 Ves. 186. *Pelham v. Anderson*, 2 Eden, 296. Therefore in a late case, where a sum of money was bequeathed to be laid out in the funds, and the interest and dividends to be applied in *providing* a proper school-house, the bequest was held a good charitable bequest, inasmuch as a school-house might be hired. *Johnston v. Swann*, 3 Madd. 457. And where a sum of money was bequeathed to erect a *Blue-coat School*, and establish a *Blind Asylum*, with a direction that lands should not be purchased, and which direction was accompanied by the expression of an expectation that lands would be given for the charities, the bequest was determined to be valid. *Henshaw v. Atkinson*, Ib. 307. A gift of personalty to *establish* a school has been considered good. *Attorney General v. Williams*, 4 Bra. C. C. 526.

which at the time of the will was in mortmain^a. And where Thomas Mundy, late rector of Bickton in Devonshire, by his will gave two sums of 400*l.* and 100*l.* to trustees, in trust to be laid out in building a parsonage-house on the glebe of Bickton, the same was held not to be within the statute of mortmain.——Master of the Rolls. It is not within the words nor meaning of the statute. The statute was intended to prevent new acquisitions in mortmain. Erecting a building is not to be considered as such. Suppose the testator had not made such devise, he might have been sued for dilapidations, and the money recovered would have been laid out upon the building. This is nothing more⁽⁷⁾.

Where mortgages, chattels real and personalty, are bequeathed to a charity, the bequest of the personalty will not be void. As where William Moor made his will 15th July 1763, and gave the residue of his personal estate in these words: "My will is, That the remainder of my effects, annuities, mortgages, bonds, or notes, with my household furniture, &c. be sold; and what money they shall sell for, I give to two charity schools for boys and girls of St. Andrew's, Holborn, now kept in Hatton-garden, towards their education and clothing for ever, to be divided into two equal parts, half to each school."—It was here held that the devise of the mortgages is void, but being part of the enumerated residue, they were ordered to be applied first in payment of debts, before any part of the personal

^a *Harris v. Barnes*, Amb. Rep. 651. ^o *Glubb v. Attorney General*, Ibid. 373.

(7) It is now perfectly well settled, that when money is directed by will to be applied simply in the melioration of lands in mortmain, or for building upon them, and no additional land is to be put into mortmain, such direction will be enforced. *Attorney General v. Bishop of Chester*, 1 Bro. C. C. 444. *Attorney General v. Parsons*, 8 Ves. 186. *Attorney General v. Davies*, 9 Ves. 543. *Attorney General v. Manby*, 1 Meriv. 345. But to effectuate the disposition the testator must himself point out or ascertain the lands in mortmain. *Chapman v. Brown*, 6 Ves. 404.

estate, to leave a larger fund for the charity. — The Master of the Rolls distinguished between the case where a mortgage is given as a specific bequest, and where it passes by the residuary bequest, enumerated and described among the different species of estates, of which the residue consists. In the former case it cannot be first applied to pay debts, but in the latter it may; and his honor gave directions accordingly, that the mortgages should be first applied. — This, the reporter observes, is not properly marshalling assets, but arranging the different species of personal estate.^p

And where the testator being seised of a small estate and possessed of leasehold and other personal estate, by will, 3d December 1754, devised all his real and personal estate to trustees, upon trust to sell and pay debts and legacies, and place out the surplus money at interest; and to pay the interest to his brother for life; and after his death the principal for the benefit of poor dissenting ministers living in any county. — A bill was brought by E. K. as heir at law and only next of kin, to set aside the charitable bequests. It was in proof, that there are three distinct societies of dissenters, and that collections are made for the poor ministers of each society. — Held, the bequest was not void for uncertainty, but should go to the poor ministers of each society. But it is to be observed that, what was thus to go, was only the residue of the personalty. — A question was made by the court, Whether they could marshal the assets in favour of the residuary bequests, by directing the leaseholds to be applied, in the first place, in payment of debts and legacies, in order to leave the rest of the personal for the benefit of the charity? But it was given up on the part of the charity, upon the authority of the *Attorney-General v. Tyndall*.^q

William Grimmett, by will, devised 5-24ths of his estate, after the death of his wife, and payment of his debts and legacies, and also 20*l.* a year after the death of his brother, to be applied in clothing and educating twenty poor boys, sons of parishioners of Brighthelmstone in *Sussex*, in the prin-

^p *Attorney General v. Caldwell*,
Amb. 635.

^q *Waller v. Childs*, Amb. Rep.
524.

ciples of the protestant religion, agreeably to the present national and established church of England, and in reading, writing, arithmetic, merchants' accounts, and navigation; none to be admitted after eight, or continued after fifteen. And his will and pleasure is expressed to be, that the *5-24ths* of his estate, after his debts and legacies paid, together with the 20*l.* a year after the death of his brother, or which should be deemed as an equivalent to the 20*l.* a year, 570*l.* to be invested in some of the public funds where there is a parliamentary security to stand in the name of the trustees, *until the whole can be laid out in the purchase of lands, to the satisfaction of the governors and trustees* whom he appointed, which lands are directed to be purchased in the names of the trustees to the uses aforesaid; that is, the interests, profits and rents of the *5-24ths* of his estate, together with the interest, profits, and rents of the said 570*l.* after the death of his brother, or the lands which should be purchased therewith, should be applied annually for ever in clothing and educating twenty poor boys as aforesaid.

The testator had no real estate.—It was insisted for the charity, that there is an election in the present case in the trustees, either to lay out the money in land, or continue it in the funds.—Lord Hardwicke. The testator directs his executors should settle and secure by lands of inheritance, &c., if he had rested upon such first words, this devise would have been clearly void; but then he goes on in the disjunctive, or otherwise, as they shall be advised. If one method is lawful that shall be pursued and take effect. This is not a clear case—Query. If this is a good and valid disposition of the 570*l.* and *5-24ths* of the remainder of testator's estate, or void by statute of mortmain?—I do not lay any weight on the directions to place the money in the funds in the first place; for that would be to make the validity of a will depend upon the order of the words. The direction is, to place the money in the funds until laid out in lands to the satisfaction of the trustees. When can that be? Not while this statute is in force. Suppose it had been, till by law it may be, such bequest would be good. Those words

must mean, when the trustees approve of laying it out : that cannot be while the statute of mortmain is in force ; it would be to act contrary to their trust.

His Lordship further investigating the case said, suppose the trustees in this case would not act, the trust would devolve on the court, and I would order the money to be placed in the funds, and not invested in lands. Sir Joseph Jekyl always did so before the statute. — Decreed the devise to be good, and the money to be invested in South-Sea Annuities^r (8).

Shortly after this decree a case was before the court, in which testator had, by will, given his personal estate to trustees, in trust, until they could meet with a purchase of lands, and should actually purchase the same, to pay the interest of 120*l.* to and among such poor and necessitous persons inhabitants of the town of H. as his executors should think proper objects of charity ; and willed that the trustees as soon as they could meet with a suitable purchase, should lay out 120*l.* in the purchase of an absolute estate of inheritance in fee-simple, to be conveyed and assured, and vested in trustees for ever, in trust to pay and apply the rents, &c. to the charity. — Master of the Rolls said, that Lord Chancellor declared, he did not think the case of *Grimmett v. Grimmett* clear ; and that if there had been express words of direction to trustees to settle and secure lands, &c. it would be within the statute. — His honour was of opinion, that the second clause was directory and not discretionary. He was not for carrying the case further than *Grimmett's*, and decreed the devise void^s.

If money be given to be laid out *in lands or otherwise*, to a charitable use, it hath been determined that such devise is

^r *Grimmett v. Grimmett*, Amb. Rep. 210.

^s *English v. Ord*, July, 1754. (1 Ves. jun. 548.)

(8) See *Grievess's case*, 1 Ves. jun. 548., in which this case is observed upon, and where it was held, that if the direction to the trustees to lay out the money in land be imperative, the bequest is void in its nature.

good, by reason of the words [*or otherwise.*] As where a man made his will in these words: "I will and desire, " that my executors, within twelve months after my decease, do settle and secure, by purchase of lands of inheritance or otherwise, as they shall be advised, out of " my personal estate, one annuity or yearly payment of " 50*l.* to be paid yearly and distributed for ever, by my " executors, their heirs and assigns, among the poor and " indigent people of Leeke, in the county of Stafford, in " such manner as they shall think fit. And my will also is, " that my executors do settle and secure one other annuity " of 5*l.* to be paid yearly to the vicar of Leeke for the " time being for ever, for preaching an annual sermon on " the 12th day of October." And the testator devised the residue of his personal estate to be equally divided between his sisters, Mrs. Soresby and Mrs. Hollins. By the Lord Chancellor Hardwicke: The only question in this case is, whether the devise of the two annuities of 50*l.* and 5*l.* to charitable uses, is void by the late statute of mortmain? I am of opinion, upon this act of parliament, that this bequest was not void, and that there is no authority to construe it to be void, if by law it can possibly be made good. The act of parliament is not at all aimed against perpetual charities *merely as such*, or to prevent the establishment or creation of them, but is designed against the cases of perpetual charities *in lands*, and (as the title imports) to restrain the dispositions of lands whereby the same become unalienable. The whole recital, and enacting part of the statute, take notice only of the unalienable disposal of land, whereby heirs are disinherited; and therefore the alienation and conveyance of lands to such purposes are prohibited. And although there is a clause to prohibit money being laid out in lands to such purposes as would make them unalienable; yet there is no restriction whatsoever upon any one from leaving a sum of money by will, or any other personal estate to charitable uses, provided it be to be continued as a personalty, and the executors or trustees are not obliged or under a necessity of laying it out in land by virtue of any direction of the testator for that purpose. If a devise in a will is in the disjunctive,

and leaves the executors two methods to do a particular thing, the one lawful and the other prohibited by law, can any court say, because one method is unlawful, that therefore the other is so, and the whole bequest void? No; for if one bequest is lawful, that shall be pursued, and take effect. It hath been argued against this devise, that the words *for ever* shew the annuities must arise out of some real estate, which only is capable of supplying them for ever; for personal funds are too perishable and transitory in their nature to answer such everlasting annuities; and if a particular sum were vested in stock, with design to purchase a particular yearly sum or annuity, it may happen the company may be quite dissolved, or the stock may fall, or interest be so reduced, that half the annuity may not be produced. But these objections may be over-ruled. For if the company should be dissolved, the principal stock may be taken out and vested in some other company. And there may be annuities that may probably continue for ever, and yet not payable out of land. I will mention an instance of one which has lasted a century and a half, and may exist perpetually; which is, Sir Thomas White's charity, being a disposition of money to be employed by continual rotation in loans to poor tradesmen, of several sums to be lent for a settled number of years, and then to be repaid. And any man may, at this day, give by will a perpetual charity in this manner. But if a man by will secures such loans by lands, or purchase of lands, such devise shall be void, and contrary to the late statute of mortmain.— After his Lordship had discussed another point of argument brought against this devise, as that the words [*heirs and assigns*] did import a purchase in land, or some real thing; he says, I am of opinion, upon the whole, that there is nothing that makes this bequest void in every part: but it is good in that way which the law does not forbid. But I would not have it questioned, if a man should by his will direct a sum of money to be laid out in land, or upon rent-charge to be secured upon land for any charity, and in the mean time (till it can be laid out) to be invested in government securities for the benefit of the charity, but that such bequest will be

void ; because the final end and intention of the testator was to dispose of his money in land, and the investiture of it in government and personal securities was but to secure it till a proper purchase of land or rent-charge offered. — As to the annuity of 5*l.* there are fewer objections to that than to the other : for there is no direction at all for any money or personal estate to be laid out in land ; for the executors are only willed to *secure and settle 5*l.* a-year* for the purpose there mentioned, and it must be secured upon a personal fund consistent with the will and intention of the testator, and not contradictory to the words of the act of parliament. — And as it is often said in the old books by the judges, that “ I was by at the making of the act of parliament, and “ the meaning and intention of it was then said to be this “ or, that ;” so I was by at the making of this statute, and it was at that very time said by the legislature, that it would not hinder any charitable distribution of a personal estate. Therefore it was determined that the devise was good ; and that the money should be vested in South-sea stock, for the charitable purposes mentioned in the will : (9).

^c *Soresby v. Hollins*, 2 Burn's Eccles. Law, 556.

(9) A devise to trustees of a reversion in land to be applied by them and their successors and the officiating ministers for the time being of a methodist congregation, as they should from time to time think fit to apply the same, is not a devise to charitable uses within the statute. *Doe d. Toone v. Copestake*, 6 East, 328. And it has been decided that if a testator mention particular objects in his will, who are in the first instance to enjoy the benefit of a general charitable bequest, and who appear to be more immediately within his view and intention, the court will support the legacy in favour of the persons described, though it be under the necessity of annulling the disposition in regard to the general purposes of the charity. *Blandford v. Fackerell*, 4 Bro. C. C. 394. *Doe d. Phillips v. Aldridge*, 4 T. R. 264. See also *Doe d. Burdett v. Wrighte*, 2 Barn. & Ald. 710. But where the general object of the devise is void, to support, upon an intention of personal benefit, the particular interest

Hence we may perceive how landed property is guarded from being affected by a devise or bequest to a charitable use; and yet no restraint is laid on money being bequeathed to such use; and thereby we have seen in the case last cited, a perpetual charity may be established: but it is well in bequeathing to bodies corporate, companies, hospitals, &c. to be accurate in describing them, as the following cases will demonstrate, and likewise further shew the power and benignity in the court of chancery with respect to charitable bequests.

J. S. by his will duly executed, gave his estate to B, his heirs, executors, and administrators; and by a codicil written by himself, and not attested by three witnesses, declared the use to which he would have his estate applied, in the words following: "I would have the same employed for encouraging such nonconformist ministers as preach God's word in the place where the people are not able to allow them a sufficient suitable maintenance; and for the encouraging the bringing up some to the work of the ministry; who are designed to labour in God's vineyard among the dissenters: the particular method how to dispose of it I prescribe not, but leave it to their discretion, desiring you (meaning B) to take advice of C and D." B, C, and D, all died before the testator. In this case two questions arose. 1. Whether both the trustees, to whom the disposition and appointment of the said charity was given, dying in the lifetime of the testator, that charity was not gone, and in the nature of a lapsed legacy? By King, Lord Chancellor: The substance of the charity remains, notwithstanding the death of the trustees before the testator; and though at law it is a lapsed legacy, yet in equity it is subsisting; and here is a sufficient certainty of the testator's intention to revive it. The intention therefore of the party is sufficiently manifest that

of a devisee, it must be totally separate from that general object. *Grievess's case*, 1 Ves. jun. 548.

this charity should continue within 43 Eliz. c. 4. (10). The second question, whether this be a superstitious use within 1 Edw. VI. c. 14. dissenters being such general words as comprehend any persons, however opposite to the church of England. By the Lord Chancellor: This cannot be a superstitious use within the statute; the dissenters here meant are protestant dissenters acting under the toleration act 1 W. & M. c. 18. and decreed the *residuum* of the testator's estate to be disposed of to the charity, and ordered a scheme to be laid before him for that purpose^a.

^a *Attorney General v. Hickman*, 2 Eq. Cas. Abr. 193.

(10) So where a testatrix gave all the residue of her personal estate to A B, desiring him to dispose of it in such charities as he thought fit, but recommending poor clergymen with large families and good characters; and A B died nine years before the testatrix, of which she had full knowledge, but made no alteration in the residuary disposition; the court effectuated the charitable intention by sustaining and executing the bequest. *Moggridge v. Thackwell*, 3 Bro. C. C. 517. S. C. 1 Ves. jun. 464. 7 Ves. 36. & 13 Ves. 416. It is to be observed, that the same words in a will, when applied to the case of individuals, require a very different rule of construction from that which will govern them when applied to the case of a charity. If a man give his property to such person as he shall thereafter name to be his executor, and afterwards appoint no executor; or if, having appointed an executor, he dies in the lifetime of the testator, and no other person is appointed to supply his place, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take his personal estate. But to give effect to a bequest in favour of charity, the court of chancery will, in both instances, supply the place of an executor, and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly on principles in the *Roman* law, not at present perfectly comprehended, and, partly on the religious notions which formerly prevailed in this country, according to which it fell to the ordinary's province to distribute in case of intestacy. See *Mills v. Farmer*, 1 Meriv. 94.

Richard Holt, possessed of a considerable personal estate, made his will in 1769; and after giving various legacies, disposed of the *residuum* of his estate in manner following: one half thereof he gave to the *Foundling Hospital*, and the other moiety to the *Lying-in-Hospital*; and *if there should be more than one of the latter, then to such of them as his executor should appoint*. — He then appointed A B his executor; but the testator afterwards struck out the executor's name, and appointed no other executor, and died in 1775. Benjamin White, the plaintiff, proved the will as a testamentary paper, and took administration with the paper annexed, as one of the next of kin. The defendants are the other next of kin, and the governors of the *Foundling Hospital*, and of the several *Lying-in-Hospitals*. — The plaintiff in his bill insists that the devise of the moiety to the *Lying-in-Hospital* became void by striking out the name of the executor, who was to appoint, and that it should be referred to the master to report who are entitled as next of kin. The defendants, the next of kin, also claim that moiety as being void. In support of the bill it was argued, that the appointment of the executor being revoked, the devise itself is revoked, there being now no person existing who can appoint; and that the testator having revoked the executor's name, he meant to revoke the devise. For the hospitals, it was argued that the obliteration of the name did not defeat the intent, so as to prevent the money from going to some one or all the lying-in-hospitals. That it is impossible it should go as it was left; but the court will stand in the executor's place. All the rules shew great latitude and liberality of construction, and where the testator refers to any person who cannot act, the court will carry the devise into execution as near as may be. The cases prove, that where money is indefinitely given, the court will exercise its judgment: If the testator had given it to such a charity as the executor should name, the court must have applied it. By the Lord Chancellor: My notion is, that in the case of charities, this court derives a great latitude of authority from the

extensive nature of most charities ; because they cannot go upon the same strict rules which prevail in private cases : but that is well resolved into the purpose and the mode. Where the testator is willing it shall go in the largest extent, the court will follow his intent in marking out objects. I wish to pursue this method of construing the intent of testators. — The question is here, whether the legacy is void, the executor's name being struck out, and there being no person upon whom it could devolve, or whether the court will sustain it ? It has been argued, that the court has great extent of jurisdiction, in making legacies certain which were before uncertain ; and secondly, in applying them where it is not known to what use they were intended. There has been at all times an exercise of this authority, where a legacy has been doubtfully given. Here the testator giving a legacy to the next of kin, and to the executor names a particular charity, a residuary legatee ; the question is, only, how the trust shall be carried into execution ? I remember to have read a case somewhere [*Attorney General v. Hickman*,] where a legacy is given to B, for the benefit of nonconforming ministers, with the advice of C and D. At the testator's death B, C, and D, were all dead, yet the court sustained the legacy. It must be referred to a master, to which of the lying-in-hospitals it shall be paid^x.

George Cranstown, by his will, gave the interest of 4200*l*. Bank annuities to the poor inhabitants of St. Leonard, Shoreditch. — A bill in chancery was by relators, to establish the charity ; and after argument at bar, in which it was insisted for the defendants, that the bequest is void, for uncertainty in the description of the persons to take, — Sir Thomas Clarke, master of the rolls, gave his opinion in favour of the charity, and said, that the court has done so in many cases where the expressions were much more general and uncertain : that in those cases the court forms a judg-

^x *White and White*. 1 Bro. Cha. Rep. 12. — The master, which has often been occasionally mentioned, is an officer of the court, and called

a master in chancery, of whom there are twelve in number, including the master of the rolls. To them matters are referred to be examined.

ment upon taking all the circumstances into consideration, and inclines in favour of the disposition *ut res magis valeat*. In the case of the *Attorney General v. Rance*, 18th July 1728, a legacy was given to the poor. There were no words in the will which discovered what poor he meant; but it appearing, that the testator was a *French* refugee, the court directed the legacies to be given to the poor refugees. — The *Attorney General v. Browne*, 18th November 1749, the words were very general; but his honour did not mention them. — The words in the present case are not so uncertain as in those cited. The word *inhabitant* bears a very general sense, and may extend to every body living in the parish. But as it could not be intended, that the poor inhabitants which are relieved by the parish should have benefit by this legacy, which in effect would be giving to the rich and not to the poor, he declared, that the distribution of the legacies was to be confined to the poor inhabitants in Saint Leonard, Shoreditch, not receiving alms; and ordered a scheme to be laid before the master for such distribution (11).

Sir David Williams, by will 15th January 1612, devised the whole profits of an estate to a charity; and the rents having since been greatly increased, and now produce annually more than sufficient to answer the particular sums in the will; the *Query* was, Whether the surplus should be applied in augmentation of the bequests in the will, or should go to the heir at law? — Held they should go to the increase of the charity*. So where William Tymperon, by will 20th

* *Attorney General v. Clarke*,
Amb. Rep. 422.

* *Attorney General v. Johnson*,
Amb. Rep. 190.

(11) In a late case a testator bequeathed the residue of his estate to "the widows and children of seamen belonging to the town of *Liverpool*," and the master, on a reference to him for the purpose, having reported that a charitable institution had been before created for the same objects in that town, Sir *William Grant* held the bequest valid, and directed the funds to be applied in aid of the subsisting charity. *Powell v. Attorney General*, 3 Meriv. 48.

Nov. 1723, devised to a charity, the rents being increased, the charity was directed to be increased * (12).

* *Attorney General v. Sparkes*, Ibid. 301.

(12) The doctrine laid down in the case of *Thetford School*, 8 Co. 130. Duke's Ch. Us. 71. which has been adhered to since, was, that if the whole land, and the rents of it at the time are given for a charity, those to whom the lands are given, must, if there is an increase in the rents, apply them to charitable purposes. The intention of the donor has been considered as warranting such an application, and the courts have inferred that he has been mistaken merely as to the *quantum* necessary to accomplish that intention. See Duke's Ch. Us. 112. *Attorney General v. Arnold*, Show. P. C. 22. *Attorney General v. Earl of Winchelsea*, 3 Bro. C.C. 373. *Attorney General v. Haberdasher's Company*, 1 Ves. jun. 1. S.C. 4 Bro. C.C. 103. *Attorney General v. Coventry*, 2 Vern. 397. This doctrine, however, does not apply where a part only of the original rents are appropriated to the purposes of charity. Therefore where a sum of money was given by deed to a corporation for the purposes therein mentioned, and to the intent that it should be laid out in the purchase of lands of a clear yearly value, the rents of which exceeded at the time what was to be distributed amongst certain charities, of which the corporation was one, there being no express gift of the surplus, and the decrease and subsequent increase of the rents being in certain cases provided for, it was held that the other charities were not entitled to call for a distribution of the increased rents, but that they belonged to the corporation. *Attorney General v. Mayor of Bristol*, 2 Jac. & Walk. 294. S. C. 3 Madd. 319. In distributing the increased revenue of a charity estate, the court of chancery may apply it by way of augmentation of the original objects. *Ex parte Berkhamstead Free School*, 2 Ves. & Bea. 139. Or it will apply or approve of the application of the excess for the benefit of the charity, in a way though not in express terms directed by the will, yet in furtherance of the general intention. *Bishop of Hereford v. Adams*, 7 Ves. 324. *Ex parte Lane*, 4 Madd. 479. And it seems that court has authority to alter not only the proportions in which the objects of the charity would take under the original instruments, but also the objects themselves.

That charities may be established for dissenters is perceivable by the cases of *Waller v. Childs* and *Attorney General v. Hickman*, heretofore cited. So where Ann Partridge by her will devised an annuity to the minister of a baptist meeting-house, in the parish of Hemel Hempstead. The question was, whether this was such a charity as is proper for the court to establish? In support of the charity was cited the case of the *Attorney General* and *Andrews*, 1 Vesey, 225., wherein copyhold lands were devised by will made before the statute, for the benefit of quakers, and not surrendered to the use of the will: and on a bill the Lord Chancellor established it. On the other hand was cited the case of *De Costa v. De Päs*, by Sir John Strange, master of the rolls for Lord Chancellor: This case is not now to be made a question. Baptists are persons the legislature looks upon as well as quakers. In the quakers' case, the court went a great way, not only countenancing it as a good charitable use, but supplying the want of surrender to the use of the will. The Jew case is different, and was held an illegal charity.—Decreed the charity to be established, and the minister to have his costs ^b (13).

^b *Attorney General* and *Cock*, 2 Ves. 273.

Thus, where a person had founded a charity by giving an alms-house to five poor men, Lord *Hardwicke* increased the number of men to ten, and added five poor women, on the notion that his power was not simply confined to an increase of the objects of the charity, but that he might make an alteration in them. See 2 Jac. & Walk. 320.

(13) Where land or money is properly given for maintaining the worship of God *without more*, the court of chancery will execute the trust in favour of the Established Religion. But if it be clearly expressed that the purpose is that of maintaining dissenting doctrines, so long as they are not contrary to law, the court will execute the trust according to the express intention. *Attorney General v. Pearson*, 3 Meriv. 409. In that case it was made a question whether a trust for promoting Unitarianism could be carried into effect, but it was not decided.

As concerning superstitious uses, A, being a beneficed clergyman, devised 600*l.* to Mr. Baxter, to be distributed by him to sixty poor ejected ministers, and adds that he did not give it them for the sake of their nonconformity, but because he knew many of them to be pious and good men, and in great want; he also gave to Mr. Baxter 20*l.*, and 20*l.* more to be laid out in a book of his, intitled *Baxter's Call to the Unconverted*. It was held by North, Lord Keeper, that this was a superstitious use, which, though void, yet the charity is good, and shall be applied in *eodem genere*, and therefore decreed it for the maintenance of a chaplain for Chelsea college^c. But this decree was reversed by the lords commissioners in Trin. Term. 1689, and the 600*l.* which had been brought into court, ordered to be paid out and distributed according to the will^d.

Ann Barlow devised her estate to Lady Portington and her heirs absolutely without any trust; which she did for the good of her soul, and owned that this estate was not hers, but belonged to God and his saints. — An information was preferred in the exchequer for a discovery, and an application of the devise to an use truly charitable. It was held that the king, as head of the commonwealth, is obliged by the common law, and for that purpose intrusted and impowered to see that nothing be done to the disherison of the crown, or the propagation of a false religion, and to that end he was entitled to pray a discovery of a trust to a superstitious use. That this use being superstitious, is merely void, and for that reason the king cannot have it: yet however it is not so far void as that it shall result to the heir, and therefore the king shall order it to be applied to a proper use^e.

In the Jew case heretofore mentioned, *Elias de Pas*, a Jew, by will established a fund of 1200*l.* to be appropriated in order to apply and dedicate the revenue of that sum towards

^c Trin. 1684.

^e *Rex v. Lady Portington*, 1

^d *Attorney General v. Baxter*,

Salk. 162.

1 Vern. 248.

establishing a Jesuba, or assembly for reading the law, and instructing people in our holy religion. — The question was, to whom the same sum should belong? Whether to the next of kin, or as a charity for the crown to dispose of? — A distinction was taken by Lord Hardwicke, chancellor, That when the devise is to a superstitious use, and made void by statute, or to a charity made void by statute of mortmain; there it should belong to the heir at law or next of kin; but where it is in itself a charity, but the mode in which it is to be disposed is such, that by the law of England it cannot take effect, as in the present case, in promoting a religion contrary to the established one; there the crown by sign-manual directed to the Attorney General, may give orders in what charitable manner it shall be disposed of. — The reporter says he was informed, that 1000*l.* of the money was directed by sign-manual to be disposed of to the Foundling hospital (14).

If a devise be to *charitable purposes and uses*, generally, it

^f *De Costa v. De Pas*, Amb. Rep. 228.

(14) See a fuller report of the case of *De Costa v. De Pas*, 2 Swanst. 487. n. The distinction there taken by Lord Hardwicke has been subsequently recognised and acted upon by Sir William Grant, in a case in which a testator bequeathed the residue of his personal estate to his executors for the purpose of educating and bringing up poor children in the *Roman Catholic Faith*, and it was held that the bequest was unlawful, and must be applied to such use as the King should direct. *Cary v. Abbott*, 7 Ves. 490. It seems a Jewish synagogue is not an illegal establishment. *Israel v. Simmons*, 2 Stark, N. P. C. 356. And although a bequest for the propagation of the Jewish or Roman Catholic religions, is void, yet persons of either of those persuasions may be made the objects of a charitable institution. 2 Swanst. 522. It has, however, been decided, that Jews are not entitled to the benefit of the *Bedford* charity; but that decision turned upon the particular terms of the charter of endowment. Ibid. 470. .

is not void, but the crown may appoint. So also if the charitable object be uncertain s (5).

^s *Attorney General v. Herrick*, Ibid. 712.

(15) It is now clearly established that in all cases in which a testator has expressed a general intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the court of chancery will effectuate the intention by supplying the mode which alone was left deficient. In doing so, the court has imagined that the intention is more nearly executed by finding a purpose bearing some affinity to that which the testator himself has pointed out, than by letting the property go, as it would have gone, if no disposition whatever had been attempted to be made of it. 2 Freem. 390. *Attorney General v. Syderfin*, 1 Vern. 224. *Mills v. Farmer*, 1 Meriv. 55. But to induce the court to execute the intention, a charitable purpose must be sufficiently expressed, for if the property is to be applied in favor of objects who do not strictly come within the technical denomination of charitable objects, it will not interfere. Therefore where a testator bequeathed to trustees all his personal estate in trust for such *benevolent* purposes as they in their integrity and discretion might unanimously agree upon, the court refused to support the bequest as a charitable legacy, because the word *benevolent* could not be restricted to the sense of *charitable*. *James v. Allen*, 3 Meriv. 17. See also *Morice v. Bishop of Durham*, 9 Ves. 389. *Vezey v. Jamson*, 1 Simons & Stuart, 69. And if the gift be to a *particular* charity, and the particular purpose cannot, from any cause, be effectuated, the subject matter of the gift cannot be applied to another lawful use, because the *general intention* in favour of charity cannot in such a case be inferred. *Attorney General v. Bishop of Oxford*, 1 Bro. C. C. 444. n. *Blandford v. Fackerell*, 4 Bro. C. C. 394. S.C. 2 Ves. jun. 238. *Attorney General v. Minshull*, 4 Ves. 14. *Corbyn v. French*, Ib. 418. *Chapman v. Brown*, 6 Ves. 404. — It was for some time an unsettled question, in what instances the distribution of property bequeathed to indefinite charitable purposes, should be left to the discretion of the King as *parens patriæ*, and when that duty was to be considered as devolving upon the court of chancery, under a scheme or plan recommended by the master. However, Lord Eldon has adopted a distinction,

which has since been adhered to, and which is this; that where the charitable bequest is *through the medium of trustees*; whether all the trustees are dead, or some being dead, the discretion is either wholly or partly gone; or surviving trustees refuse to act; or some are willing to act, and the others refuse: in all those cases the court distributes the fund by means of a *scheme*; but where the object is charity *without a trust* interposed, the constitution, in the language of Lord Chief Justice *Wilmot*, finds a trustee in the King, as *parens patriæ*, who executes it by sign manual; exercising a discretion with reference to the intention of the testator. *Moggridge v. Thackwell*, 7 Ves. 85. *Paice v. Archbishop of Canterbury*, 14 Ves. 364.

APPENDIX

OF

PRECEDENTS.

NUMBER I.

A Man possessed of Money, Plate, Household Goods, a Leasehold Estate for Years; another for Years determinable on the Deaths of Three Persons named in the Lease; and having divers Sums of Money due to him; but is not possessed of any Real Estate, *gives the whole to his Wife.*

IN THE NAME OF GOD, AMEN. I John Stiles, of Cheap-side, in the city of London; linen-draper, being in health of body, and of sound mind, memory, and understanding, do make this my last will and testament in manner and form following: I give, devise, and bequeath, unto my beloved wife, Mary Stiles, all my money, securities for money, goods, chattels, estate, and effects, of what nature or kind soever, and wheresoever the same shall be at the time of my death. And I do nominate, constitute, and appoint my said wife sole executrix of this my last will and testament, hereby revoking and making void all and every other will or wills at any time heretofore by me made, and do declare this to be my last will and testament. IN WITNESS whereof, I the said

John Stiles have hereunto set my hand and seal this day of _____, in the year of our Lord 18 ____^a.

*Signed, sealed, declared, and published,
by the abovenamed John Stiles, as and
for his last will and testament, in
the presence of us, who, at his request,
and in his presence, have subscribed
our names as witnesses thereto^b,*

JOHN STILES.

[Place of
the Seal.]

THOMAS JONES.
RALPH HICKES.

NUMBER II.

**An unmarried Woman or Spinster, possessed of Money,
Household Goods, and other Personal Estate.**

1. *Wills to be decently buried in her parish church.*
2. *Gives 500*l.* to one Brother, 600*l.* to another, and 300*l.* to a Nephew, to be paid when he attains twenty-one Years of Age; Interest thereof, in the mean time, to be applied towards his Maintenance and Education.*
3. *Residue to a Brother, whom she appoints Executor.*

IN THE NAME OF GOD, AMEN. I Sarah Matthews, of German-street, in the parish of St. James's, in the liberty of Westminster, and county of Middlesex, spinster, being in health of body and of sound mind, memory, and understanding, do make this my last will and testament in manner
1. and form following: FIRST, I will and desire that I may be decently buried in the parish church of St. James's
2. aforesaid. AND I give and bequeath unto my brother John Matthews, the sum of 500*l.*; Also, I give and bequeath unto my brother William Matthews, the sum of 600*l.*; Also, I give and bequeath to my nephew William Matthews, son of my brother Thomas Matthews, deceased, the sum of 300*l.*; to be paid to my said nephew, when he

^a Figures are put here for the sake of brevity, and so in the other forms hereafter laid down: yet it is proper to write the whole of the will in words, and that without any contractions.

^b If the testator makes two parts of his will, say, next after the word "thereto," as we have likewise done to a duplicate thereof.

attains twenty-one years of age; and the interest thereof in the mean time to be paid and applied towards his maintenance and education, in such manner as my executor 3. hereinafter named, shall in his discretion think fit. ALL the rest and residue of my money, goods, chattels, estate, and effects of what nature or kind soever, I give and bequeath unto my brother James Matthews; And I do nominate, constitute, and appoint, my said brother James, sole executor of this my last will and testament; hereby revoking and making void all and every other will and wills at any time heretofore by me made, and do declare this to be my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal, this day of in the year of our Lord 18 .

Signed, sealed, &c. }
[as in No. I.] }

SARAH MATTHEWS.

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NUMBER III.

A Widow, possessed of Goods, and Houses held by Leases for Terms of Years.

1. Gives an House and some Household Goods to a Son.
2. Another House to a Daughter.
3. Residue to another Son, and appoints him Executor.

IN THE NAME OF GOD, AMEN. I Mary Kemp, of the borough of Honiton in the county of Devon, widow, being sick and weak in body, but of sound mind and memory, do make and declare this my last will and testament, in manner and form following: I give, devise, and bequeath unto my son John Kemp, all that my leasehold dwelling-house, messuage or tenement, situate and being in the borough of Honiton aforesaid, now in the tenure or occupation of Francis Holland, cabinet maker; And also my bureau and bookcase, with glass doors, my silver quart two-

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handled cup, marked I. K., my large mahogany square
2. table, and mahogany pillar and claw table. Also, I give, devise, and bequeath, unto my daughter Elizabeth Kemp, all that my leasehold dwelling-house, messuage, or tenement, situate and being in the parish of Coombrawley, in the said county of Devon, and now in the tenure or occupation of Thomas Jones, butcher. ALL the rest, resi-

due, and remainder of my estate and effects, of what nature or kind soever, I give, devise, and bequeath, unto my son Thomas Kemp; and I do hereby nominate, constitute, and appoint my said son Thomas sole executor of this my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal, this day of in the year of our Lord 18 .

Signed, sealed, &c. }
[as in No. I.] }

MARY KEMP.

[Place of
the Seal.]

NUMBER IV.

A married Woman, by virtue of a Settlement made previous to her marriage, disposes of Personal Estate.

1. *Mentions her Marriage Settlement.*
2. *Gives 200*l.* to her Husband; 100*l.* to her Brother; and 100*l.* to a Cousin.*
3. *Residue to be equally divided between a Nephew and Niece, if living at Testatrix's death; if either be dead, deceased's Share to go to the Survivor.*
4. *Appoints her Brother sole Executor.*

IN THE NAME OF GOD, AMEN. I Elizabeth Mills, now wife of John Mills, of the parish of Saint Margaret, Westminster, in the county of Middlesex, esquire, late Elizabeth Field, spinster, being sick and weak in body, but of sound and disposing mind, memory, and understanding, do hereby, in pursuance and exercise of the power and

1. authority given and reserved to me, in and by the settlement made previous to my marriage with the said John Mills, and by force and virtue of all and every the power and powers, authority and authorities in me being, or enabling me thereto, make my last will and testament in
2. manner following; that is to say, I give and bequeath unto my beloved husband the sum of 200*l.*; Also, I give and bequeath unto my brother, William Field, the sum of 100*l.*; Also, I give and bequeath unto my cousin Ann Soam,
3. widow, the sum of 100*l.* ALL the rest, residue, and remainder of my estate and effects, of what kind or nature soever, which I have, or shall have right to dispose of, I give and bequeath unto my nephew and niece, James and Mary Field, equally to be divided between them, in case they

are both living at the time of my death; but if either of them shall happen to die before me, then I give and bequeath the share of him or her so dying to the survivor of
 4. them. AND I do hereby nominate, constitute, and appoint my brother William Field aforesaid, sole executor of this my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal, the day of
 in the year of our Lord 18 .

Signed, sealed, &c. }
 [as in No. I.] }

ELIZABETH MILLS.

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NUMBER V.

A Man having Money, Goods, and Effects, and no Real Estate.

1. Gives to his Son, 400*l.* To a daughter, 300*l.*
2. To two Daughters, 300*l.* each, to be paid when they attain their several Ages of Twenty-one years, or be married; the Interest, in the mean time, to be applied for their Maintenance.
3. Proviso, if the Daughters marry under age, and without their Mother's Consent, their Legacies to go to first mentioned Son and Daughter.
4. Gives to Wife the use of Household Goods during her Life, and the whole thereof to his Son after her Death.
5. Residue to Wife, who is made Executrix.

IN THE NAME OF GOD, AMEN. I John Tomkin, of the parish of Saint Martin in the Fields, in the county of Middlesex, baker, being in health of body, and of sound mind, memory, and understanding, do make this my last will and testament in manner following: I give and bequeath to my son Thomas Tomkin, the sum of 400*l.*, and
 2. to my daughter Mary Tomkin, the sum of 300*l.* ALSO, I give and bequeath unto my daughters Jane and Frances Tomkin, the sum of 300*l.* each; to be paid when and as they attain their several and respective ages of twenty-one years, or on the day or days of their respective marriage, which shall first happen, provided they marry with consent as hereafter mentioned; and until my said daughters Jane and Frances shall so attain the ages of twenty-one years, or be married, my will is that the interest or produce of their several legacies shall be paid and applied

towards their maintenance and education, in such manner as my executrix, hereinafter named, shall according to

3. her discretion think fit: PROVIDED always, nevertheless, and my will and mind is, that in case one or both of my said daughters Jane and Frances shall marry before having attained twenty-one years of age, and without having first obtained consent in writing under the hand of my said executrix, then from and immediately after such one or both of them shall be so married, I do hereby give and bequeath the legacy or said sum of 300*l*. of such of my said two daughters as shall be married, and without having obtained consent as aforesaid, unto my said son Thomas, and my daughter Mary Tomkin, equally to be divided

4. between them. AND I do hereby give to my wife Elizabeth Tomkin, the use of ~~one-half of~~ ^{the whole of *} ~~a~~ my plate, linen, china, household goods, and furniture, which shall be in my dwelling-house at ^{the} ~~a~~ time of my death, to hold, use, occupy, and possess the same during her life; and from and immediately after her death, I give and bequeath the said plate, linen, china, household goods and furniture,

5. unto my aforesaid son Thomas Tomkin. ALL the rest, residue, and remainder of my money, goods, chattels, estate, and effects, of what nature or kind soever, ^{herein} not ~~a~~ before given or disposed of, after payment of my just debts, funeral expences, and the expences of proving this my will, I give and bequeath unto my said wife; and I do make, nominate, constitute, and appoint, my said wife sole executrix of this my last will and testament, hereby revoking and making void all and every other will and wills at any time heretofore by me made, and do declare this to be my last will and testament. IN WITNESS whereof I have hereunto set my hand and seal the day of in the year of our Lord 18 .

Signed, sealed, declared, and published, by the abovenamed John Tomkin the testator, as and for his last will and testament (the above erasurement and interlineations therein being first made, namely, the words,

* It is common both in wills and deeds to cut or scrape out mistakes and wrong words or letters, but it is far better to erase the same in the above form, and to take notice thereof in the attestation, as we have here done for an example.

(one half of) erased, and the words (the whole of) interlined, likewise, the word (the) and the word (herein) interlined, in the presence of us, who, at his request, and in his presence have subscribed our names as witnesses,

JOHN TOMKIN.

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LAZARUS MITFORD.
NOAH OLIVER.

NUMBER VI.

A Man having a large Stock in Trade, and other Personal Estate to a considerable Amount; but no Real Estate.

1. Takes Notice that his Wife is provided for by Settlement, and as a token of love gives her some Plate, Household Goods, and Mourning.
2. Gives Legacies to two Brothers for Mourning.
3. Legacies to Executors for Care and Trouble.
4. Residue of Household Goods, Chattels, Stock in Trade, Estate and Effects, to two Persons, upon Trust to sell; and the Money arising therefrom, and from Debts due to him, to place out at Interest for the Benefit of his Son and two Daughters, and such other Children as he might have living, or his Wife be ensient with at the Time of his Death. The Interest to be applied towards their Maintenance and Education, and the Principal to be paid at their several Ages of twenty-one Years. In case any or either die under Age, leaving Issue, such to have their Parent's Share; and in case of all their Deaths without Issue, Wife to have the Whole. If she be then dead, Testator's Brothers to have it.
5. Trustees empowered to alter or change the Securities on which the Monies be placed, and to apply the Children's Share of the Principal for putting any or either of them to Business, or setting them up therein, or advancing them in Marriage.
6. Indemnified against Expenses and involuntary Loss.
7. Appointed Executors, and constituted Guardians with Testator's Wife.

IN THE NAME OF GOD, AMEN. I William Wharton, of the parish of Saint Martin in the Fields, in the county of Middlesex, upholsterer, being sick and weak in body,

but of sound and disposing mind, memory, and understanding, thanks be to God for the same, do make this

1. my last will and testament in manner following: WHEREAS my dear and loving wife Mary Wharton is provided for by settlement made on her marriage, and thereby, on my death, will, amongst other things, be entitled to, and possessed of a dwelling-house, messuage, or tenement, situate and being at Knightsbridge, in the parish of Saint George, Hanover-square, in the said county of Middlesex, for the term of her life; Now, in token of the love and affection I have and bear for and towards my said wife, I give and bequeath to her all the plate, linen, china, household goods, and furniture of all kinds, which shall be in the aforesaid dwelling-house at the time of my death, and also
2. the sum of twenty guineas for a ring and mourning. AND I give and bequeath to my brothers John and Thomas Wharton, the like sum of twenty guineas each for a ring
3. and mourning. ALSO, I give and bequeath unto John Jones, and Thomas Jenkins, of Knightsbridge aforesaid, esquires, my executors and trustees hereinafter named, the sum of 60*l.* each, for the care and trouble they may have in executing this my will, and performing the trusts
4. hereby in them reposed. ALL the rest, residue, and remainder of my plate, linen, china, household goods, and furniture, and all my other goods, chattels, stock in trade, estate, and effects of what nature or kind soever, not herein before given or bequeathed, I give and bequeath unto the said John Jones and Thomas Jenkins, to hold to them the said John Jones and Thomas Jenkins, their executors, administrators and assigns, upon this special trust and confidence, nevertheless, that is to say, that they my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall, as soon as convenient after my death, sell and dispose thereof, and call in and receive all such debts, sum or sums of money, as shall be due and owing to me at the time of my death, and place the monies arising by such sale or disposal, and the monies so to be called in and received, upon government, or other good and sufficient security, in their own names, and in such manner as they shall think proper: And also in trust, that they do and shall receive the interest and dividends thereof from time to time, as the same shall become payable, and pay, apply, and dispose of the same, or a sufficient part thereof, for and towards the maintenance, education, support, and bring-

ing up of my son James, and my daughters Mary and Elizabeth Wharton, and such other child or children, as I shall have living, or that my said wife may be essient with at the time of my death, until my said children shall severally and respectively attain their severall and respective ages of twenty-one years; and when and as my said children shall severally and respectively attain their said ages of twenty-one years, in trust to pay, assign, transfer, and convey all the said residue of my estate and effects, with the interest, dividends, and produce thereof, as shall not have been applied for and towards the maintenance and education of my said children as aforesaid, or for putting any or either of them to business, or otherwise advancing any or either of them in life, pursuant to the power hereinafter for that purpose contained, equally unto and amongst all my said children, when and as they shall severally and respectively attain their said ages of twenty-one years: and in case any or either of my said children shall happen to die before having attained twenty-one years of age, without leaving issue of his or her body lawfully begotten; then in trust to pay, assign, transfer, and convey all the said residue of my estate and effects, and the interest, dividends, and produce thereof, or such part thereof as shall remain unapplied as aforesaid, unto such of my said children as shall live to attain his, her, or their respective age or ages of twenty-one years, share and share alike, if more than one. But in case any or either of my said children should happen to die under age, leaving issue of his, her, or their body or bodies lawfully begotten; then in trust to pay, assign, transfer, and convey the part or share of such deceased child or children unto such his, her, or their issue, share and share alike (if more than one), when and so soon as they shall severally and respectively attain their severall and respective ages of twenty-one years, and to pay and apply the interest, dividends, and produce thereof, in the mean time, for and towards their respective maintenance and education. But in case all and every of my said children shall happen to die under age, and without leaving issue of his, her, or their body or bodies lawfully begotten; then in trust to pay, assign, transfer, and convey the said residue of my estate and effects, and the interest, dividends, and produce thereof, or such part thereof as shall remain unapplied as aforesaid, unto my said dear and loving wife Martha Wharton. But in case she shall be then dead; then in

4. *Another to a Cousin out of same Estates, payable to her at a certain Sum per Week (exclusive of her Husband's control,) with same Power to enter for Non-payment, as given to the Sister.*
5. *Devises the Estates chargeable with all the Annuities to another Sister for Life.*
6. *Vests the same in Trustees for preserving Contingencies, &c.*
7. *Devises the Estates to another Sister for Life.*
8. *The same to a Man for Life. Then to Devisee's Issue in Tail Male; and in Default of Issue Male to his Issue Female, and the Heirs Male of their Bodies.*
9. *In Default of Issue of last mentioned Devisee, devises the Estates to a Kinsman for Life. Then to Kinsman's Issue in Tail Male.*
10. *Charges the Estates with Payment of a certain Sum, if last mentioned Devisee, or his Issue, have them by the Devise.*
11. *If last mentioned Devisee die without Issue; same Estates devised to another Person for Life, and then to his Issue; and on Failure thereof to Testator's own right Heirs for ever.*
12. *Devises to a Public Charity.*
13. *Pecuniary and specific Legacies to a Sister.*
14. *Residue to Wife, and appoints her and a Sister Executrices.*

IN THE NAME OF GOD, AMEN. I Thomas Noble, of Fenchurch-street, in the city of London, esquire, being sick and weak in body, but of sound and disposing mind, memory, and understanding, praised be God for the same, do make and declare this my last will and testa-

1. ment, in manner and form following : that is to say, I give and devise all that my messuage or tenements, land, and hereditaments, with the appurtenances, situate, lying, and being in the parish of Rosenense, in the county of Denbigh, and now in the tenure or occupation of David Bruce, yeoman, unto William Noble, of the parish of St. Asaph, in the said county of Denbigh, clerk, his
2. heirs and assigns for ever. ALSO, I give, grant, and devise unto my sister Elizabeth Coleman, widow, and her assigns, for and during the term of her natural life, one clear yearly annuity, rent-charge, or sum of 40*l.* of lawful money of Great Britain, to be issuing and payable out of all and every other my freehold estate or estates,

situate and being in the county of Denbigh aforesaid, and the county of Middlesex, or either of them, or elsewhere, not hereinbefore devised, and out of my copyhold estate, situate, lying, and being at Potter's Bar in the said county of Middlesex (which said copyhold estate I have surrendered to the use of this my will *;) the said annuity or rent-charge to be paid to my said sister by equal half-yearly payments, the first whereof to begin and be made at the end and expiration of six calendar months next after my decease, and always to be paid free and clear of and from all manner of taxes, charges, and impositions whatsoever, to be taxed, charged, or assessed upon the said annuity, or upon my said sister, in respect thereof by authority of parliament, or otherwise howsoever; and if it shall happen that the said annuity or rent-charge of 40*l.* or any part thereof, shall be behind or unpaid by the space of twenty days next over or after any or either of the said days whereon the same is made payable, and ought to be paid as aforesaid (being lawfully demanded), that then and from thenceforth, and from time to time as often as the same or any part thereof shall be so in arrear and unpaid, it shall and may be lawful to and for my said sister Elizabeth Coleman, and her assigns, upon the said freehold and copyhold estate and estates, every or any part or parts thereof, to enter and distrain, and the distress and distresses there found to take, lead, drive, and carry away, and to impound, detain, or otherwise to sell and dispose of the same, until thereby or otherwise, she and they shall be lawfully satisfied and paid such annuity or yearly rent-charge, or so much thereof as shall be in arrear, together with all costs, charges, and expences whatsoever as shall be occasioned by such entry, distress,

3. and sale. ALSO, I give, grant, and devise unto my beloved wife Jane Noble and her assigns, one annuity or clear yearly rent-charge of 40*l.* of lawful money of Great Britain, for and during the term of her natural life, to be issuing and payable out of and from all and every my said other freehold and copyhold estate and estates aforesaid, not hereinbefore particularly devised, and to be payable to her half-yearly; in the manner and with the like power for my said wife Jane Noble to enter upon the said premises, and to make distress and distresses,

* As to the necessity of a Surrender, see p. 162. n. 1.

- and to make sale thereof in case of non-payment of such annuity, or any part thereof, as is hereinbefore given to my sister Elizabeth Coleman, in case of non-payment of her annuity or rent-charge of 40*l.* or any part thereof
4. as aforesaid. Also, I give, grant, and devise unto my cousin Frances Julian, wife of John Julian, of Wrexham, in the county of Denbigh aforesaid, tallow-chandler, one other annuity or clear yearly rent-charge of 10*l.* 8*s.* of lawful money of Great Britain, for and during the term of her natural life, to be issuing and payable out of and from all and every my said other freehold and copyhold estate and estates as aforesaid, not hereinbefore particularly devised, and to be paid to her weekly after the rate of 4*s.* a week; and her receipt shall be a sufficient discharge for the same, which shall not be subject to the control or intermeddling of her said husband John Julian; with the like power and with the same authority for the said Frances Julian to enter upon the said premises, and to make distress and distresses, and to make sale thereof in case of non-payment of such annuity, or any part thereof, as is hereinbefore given to my said sister Elizabeth Coleman, in case of non-payment of her annuity or rent-charge of 40*l.* a year, or any part thereof as aforesaid.
5. Also, I give and devise all and every other my said freehold and copyhold estate and estates wheresoever as aforesaid, not hereinbefore particularly devised, but charged and chargeable with the payment of the said respective annuities or rent-charges hereinbefore particularly mentioned, unto my sister Mary Noble, spinster, for and during the term of her
6. natural life. AND from and immediately after the determination of that estate, by forfeiture or otherwise, I give and devise the same and every part thereof, unto James Spence and Daniel Dowling, of Tottenham-court-road, in the said county of Middlesex, gentlemen, and to their heirs, in trust only, to preserve and support the contingent remainders and uses hereinafter limited from being defeated, barred, or destroyed; and for that purpose, from time to time and at all times, to make entries and bring actions as occasions may be or require; nevertheless to permit and suffer the said Mary Noble to receive and take the rents, issues, and profits thereof for
7. and during the term of her natural life. AND from and immediately after the decease of my said sister Mary Noble, I give and devise all and every my said other

freehold and copyhold estate and estates, so given to my said sister Mary Noble, for life as aforesaid, and charged and chargeable with the several and respective annuities as aforesaid, unto and to the use of my said sister Elizabeth Coleman during the term of her natural life; and from and immediately after the determination of that estate by forfeiture or otherwise, then I give and devise the same, and every part thereof, unto the said James Spence and Daniel Dowling, and their heirs in trust as aforesaid, to preserve and support, &c. [*as in 8. clause 6. only a different name*]. AND after her decease, then I give and devise all and every my said other freehold and copyhold estate and estates wheresoever, devised to my said sister Elizabeth Coleman as aforesaid, and charged and chargeable as aforesaid, unto the said William Noble for and during the term of his natural life; and from and immediately after the determination of that estate by forfeiture or otherwise, I give and devise the same, and every part thereof, unto the said James Spence and Daniel Dowling and their heirs, in trust as aforesaid to preserve and support, &c. [*as in clause 6. only a different name*]: and from and immediately after the decease of the said William Noble, I give and devise all and every my said other freehold and copyhold estate and estates so given to the said William Noble for life as aforesaid, and charged and chargeable as aforesaid, unto and to the use and behoof of the first son lawfully begotten, or to be begotten of the said William Noble, and the heirs male of the body of such first son lawfully issuing: and for default of such issue, to the use and behoof of the second, third, and all and every other son and sons of the said William Noble, and the heirs male of the body and bodies of such second, third, and other son and sons lawfully begotten or to be begotten, severally and successively, as they shall be in seniority of age and priority of birth; that is to say, the eldest of such son and sons, and the heirs male of his and their body and bodies being always to be preferred before the younger of such son and sons, and the heirs male of his and their body and bodies lawfully to be begotten; and for default of such issue, then I give and devise all and every my said other freehold and copyhold estate and estates wheresoever as aforesaid devised, to the first daughter of the said William Noble, lawfully begotten or to be

- begotten, and to the heirs male of the body of such first daughter lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, and all and every other daughter and daughters of the said William Noble, and to the heirs male of the body and bodies of such second, third, and other daughter lawfully begotten or to be begotten, severally and successively, as they shall be in seniority of age and priority of birth.
9. AND for default of such issue, then I give and devise all and every my said other freehold and copyhold estate and estates wheresoever, so devised to the issue of the said William Noble as aforesaid, and charged and chargeable as aforesaid, unto and to my kinsman John Banks, son of Thomas Banks, of Wrexham, in the county of *Denbigh* aforesaid, tallow-chandler, by Jane his wife, for and during the term of his natural life; and from and immediately after the determination of that estate, by forfeiture or otherwise, then I give and devise the same, and every part thereof, unto the said James Spence and Daniel Dowling, and their heirs in trust as aforesaid, to preserve and support &c. [*as in clause 6, only a different name*], and from and immediately after the decease of the said John Banks, I give and devise all and every my said other freehold and copyhold estate and estates wheresoever, so given to the said John Banks for life, as aforesaid, and charged and chargeable as aforesaid, unto and to the use of the first son of the said John Banks lawfully begotten, &c. [*the same as to the*
10. *issue of William Noble in clause 8.*]. AND my will is, that in case the abovenamed John Banks or his issue shall at any time hereafter be seised or possessed of the freehold and copyhold estates so devised as aforesaid, the sum of 100*l.* shall then be paid to William Banks, brother of the said John Banks; and I do hereby charge the said estates with the payment thereof accordingly.
11. AND for default of such issue of the said John Banks, I give and devise all and every my said other freehold and copyhold estate and estates wheresoever, so devised to the issue of the said John Banks, as aforesaid, and charged and chargeable with the payment of the several annuities as aforesaid, unto and to Thomas Watson, of, &c. [*in same manner as devised to William Noble, in clause 8.*]; and for want of such issue, to my own right
12. heirs for ever. AND I give and bequeath to the president, treasurer, and governors of Christ's Hospital, London, the sum of 200*l.* for the use of the said hospital;

the same to be paid within nine months after my decease.

13. ALSO I give and bequeath unto my said sister Elizabeth Coleman, the sum of 20*l*. my gold watch, silver pint and quart cups, marked T.N. and all my silver tea-spoons.

14. ALL the rest, residue, and remainder of my personal estate, of what nature or kind soever, I give and bequeath the same, and every part thereof unto my said wife Jane Noble: And I do hereby nominate, constitute, and appoint my said wife Jane Noble, and my said sister Elizabeth Coleman, executrixes of this my last will and testament; hereby revoking and making void all former wills and testaments at any time heretofore by me made, and do declare this to be my last will and testament. IN WITNESS whereof I have, at the bottom of the three first sheets of this my will (the whole whereof is contained in four sheets of paper), subscribed my name, and to this fourth and last sheet set my hand and seal, this
day of in the year of our Lord 18 .

Signed, sealed, &c. [as in]
No. I. only here must be }
three witnesses.]

THOMAS NOBLE.

Teste
[in Seal]

NUMBER VIII.

A Man makes his Will of his Real Estate only, and devises the same to a single Woman, chargeable with an Annuity given to his natural Daughter thereout.

1. *Devises the Estate subject to the Annuity.*
2. *Gives the Annuity payable Half yearly, with Power to enter and distrain after Twenty Days' Non-payment.*
3. *Power to enter and receive the Rents after Forty Days' Non-payment.*

IN THE NAME OF GOD, AMEN. I, M. J., of the parish of — in the county of Middlesex, gentleman, being in health of body, and of sound and disposing mind, memory, and understanding, praised be God for the same, do make

1. this my last will, in manner following: I give and devise unto Isabella Puella, of the parish of — aforesaid, single woman, all that my messuage, tenement, land, and hereditaments, with the appurtenances, situate, lying, and being at —, and now in the tenure or occupation of —; To hold unto her the said Isabella Puella, her heirs and assigns for ever; Subject nevertheless to, and charged and chargeable with, the annuity, yearly rent, or sum of forty pounds,

2. hereinafter mentioned. AND I do hereby give, grant, and devise, unto Jane Puella (the natural daughter of the said Isabella Puella), and her assigns, for and during the term of her natural life, one annuity or clear yearly rent or sum of 40*l.* of lawful money of Great Britain, free of taxes and other deductions, parliamentary or otherwise, to be issuing and payable out of the said messuage or tenement, land, and hereditaments, and to be paid and payable by half yearly payments, at and upon the feast-days of *Saint John the Baptist* and the *birth of our Lord Christ*; the first payment thereof to be on such of the same feast-days as shall first and next happen after my decease; and I do hereby charge and subject the said messuage or tenement, land, and hereditaments, to and with the payment of the said annuity, yearly rent, or sum of 40*l.* accordingly: and my will is, that in case the said annuity, or any part thereof, shall be behind or unpaid by the space of twenty days next after either of the aforesaid feast-days, whereon the same is hereinbefore directed to be paid as aforesaid (being lawfully demanded), that then and so often as the same, or any part thereof, shall be so in arrear, it shall and may be lawful for the said Jane Puella, and her assigns, to enter upon the said premises charged with the said annuity as aforesaid, and distrain for the same, or for so much thereof as shall be so in arrear, and the distress and distresses then and there found to detain and keep, until she shall be fully paid and satisfied all such arrearages, with costs and charges in and about the making and
3. keeping thereof. AND in case the said annuity, or any part thereof, shall be behind and unpaid by the space of forty days next after either of the said days of payment whereon the same ought to be paid as aforesaid, that then and so often as the same, or any part thereof shall be so in arrear, it shall and may be lawful for the said Jane Puella and her assigns, into all and singular the premises charged with the said annuity as aforesaid, to enter, and the rents, issues, and profits thereof to receive and take, until she be therewith and thereby, or by the person or persons who shall be then entitled to the immediate possession of the premises, paid and satisfied the same, and every part thereof, and all the arrears thereof incurred before, and that shall incur during such time as she shall receive the rents, issues, and profits thereof, or be entitled to receive the same by virtue of such entry to be made as aforesaid, together with her costs, charges, and expences, laid out and sustained by reason of the non-payment

thereof, or any part thereof¹. IN WITNESS whereof I have
hereunto set my hand and seal, the day of
in the year of our Lord 18 .

Signed, sealed, &c. [as in No. I. }
only here must be three witnesses.] }

M. J.

Witness
[Signature]

NUMBER IX.

A CODICIL,

Whereby a Will is altered, and new Legacies given.

WHEREAS I John Manning, of Fleet-street, in the city of London, hosier, have made and duly executed my last will and testament in writing, bearing date the 4th day of September 1787, and thereby given and bequeathed the sum of 200*l.* unto Thomas Mun: Now, I do hereby revoke and make void the said legacy of 200*l.* so given and bequeathed by my said will unto the said Thomas Mun, and do give and bequeath the said sum of 200*l.* unto James Franks, of Cheapside, London, haberdasher; ALSO, I do revoke and make void the two several legacies of 100*l.* a-piece, given and bequeathed by my said will unto Christopher Ham and William Ham, and do give and bequeath unto the said Christopher Ham and William Ham the sum of 40*l.* a-piece, and no more: And I do hereby give and bequeath unto Richard Win, of Foster-lane, London, cordwainer, the sum of 120*l.* And I do ordain and declare this present writing to be a codicil to my said will, and that the same shall be annexed thereto, and taken as part thereof; and do confirm my said will in every particular thereof that is not hereby altered or revoked: IN WITNESS whereof I have to this codicil set my hand and seal, the day of in the year of our Lord 18 .

*Signed, sealed, declared, and
published, by the said John
Manning, as and for a codicil
to be annexed to his last will
and testament, and to be taken
as part thereof, in the pre-
sence of*

JOHN MANNING.

Witness
[Signature]

Two witnesses. [See a codicil described, page 251.]

¹ Where the will concerns only land, there is no need of an executor, neither ought it to be proved in the spiritual court.

NUMBER X.

A NUNCUPATIVE WILL.

The LAST WILL of Thomas Mors, late of Rude-lane, in the city of London, gentleman, deceased, declared by him by words of mouth, the 4th day of September 1809. [*Here insert the words as spoken by the deceased, and conclude thus*]: Those were the words spoken by the said deceased Thomas Mors, in the presence of us who have hereunto subscribed our names as witnesses thereof, this day of 18 .
Three witnesses. [See a definition of this will, p. 233, 234.]

NUMBER XI.

A RELEASE OR DISCHARGE for a Legacy.

To ALL TO WHOM these presents shall come, I John Franks, of Wood-street, in the city of London, silversmith, send *greeting*. WHEREAS Thomas Smith, late of Fleet-ditch, in the said city of London, butcher, deceased, in and by his last will and testament in writing, bearing date on or about the 4th day of September 1809, did give and bequeath unto me, the said John Franks, the sum of 60*l*. and the said Thomas Smith, by his said will, made and constituted William Mun and James Dun, executors thereof. Now know ALL by these presents, that I, the said John Franks, do hereby acknowledge to have received of and from the said William Mun and James Dun, the said sum of 60*l*. so given and bequeathed to me in and by the said will of the said Thomas Smith as aforesaid, and thereof, and of and from every part thereof, do fully, clearly, and absolutely acquit, release, and for ever discharge the said William Mun and James Dun, their heirs, executors, administrators, and assigns, and also the estate and effects of the said testator, and every part thereof; And in consideration thereof, I the said John Franks do, for myself, my executors, administrators, and assigns, remise and release unto the said William Mun and James Dun, their heirs, executors, and administrators, all and all manner of action and actions, cause and causes of action, suits, legacies, sum and sums of money, judgments, executions, claims, and demands whatsoever, both at law and in equity, which against the said William Mun and James Dun, their heirs, executors, or adminis-

trators, or the estate or effects of the said testator, I the said John Franks ever had, or which I, my executors, administrators, or assigns, can or may have, claim, challenge, or demand, for or by reason or means, or on account of the said sum of 60*l.* so given and bequeathed to me in and by the said last will and testament of the said Thomas Smith as aforesaid. IN WITNESS whereof I the said John Franks have hereunto set my hand and seal, this day of in the year of our Lord 18 .

*Signed, sealed, and delivered
in the presence of*

JOHN FRANKS.

WITNESSES

SIMON SIMPSON,
NOAH MOOR.

NUMBER XII.

Discharge to Executors where the Testator bequeathed the Residue of his Estate and Effects to them, upon trust for his Children, with a benefit to the Survivors, if either should die under age.

1. *Recites the Will and Bequest to the Trustees, with the various Trusts.*
2. *The Trustees' power of applying the Children's Share for putting them to Business, &c.*
3. *That Testator left three Children, all of whom are living, and that the Trustees proved his Will, &c.*
4. *That one Child hath attained twenty-one years of Age; and by the Trustee's Account the three Children have been advanced different Sums; and that 1000*l.* of Testator's Estate is undisposed of.*
5. *That for making an equal Division, the several Sums advanced for each Child are added to the 1000*l.*; and the whole divided into three equal Shares, and out of each separate Share deducted the separate Sums advanced.*
6. *Child of Age releases Testator's Estate, and the Trustees, of all future Claim, except what may accrue to him by either of the younger children dying under Age.*

TO ALL TO WHOM these presents shall come. Amos Beal of the parish of St. Martin in the Fields, in the county of

1. Middlesex, ironmonger, sends *greeting*. WHEREAS Charles Beal, late of the said parish of St. Martin in the Fields, linen-draper, deceased, in and by his last will and testament

in writing, bearing date on or about the 8th day of June 1809, after having thereby bequeathed divers legacies, did give and bequeath all the rest, residue, and remainder of his plate, china, household goods, and furniture, and all other his goods, chattels, stock in trade, estate and effects, of what nature or kind soever, to David Evans and Francis Gifford. To hold unto them, their executors, administrators, and assigns, upon this special trust and confidence, that they the said trustees, or the survivor of them, or the executors or administrators, of such survivor, should, as soon as convenient after his death, sell and dispose thereof, and call in and receive all such debts, sum or sums of money, as should be due or owing to him at the time of his death, and place the money arising by such sale or disposal, and the money so to be called in and received, upon government, or other good and sufficient security, in their own names, and in such manner as they should think proper : And also in trust that they should receive the interest and dividends thereof from time to time as the same should become payable, and pay, apply, and dispose of the same, or a sufficient part thereof, for and towards the maintenance, education, support, and bringing up, of his son the said Amos, and his daughters Hannah and Jane Beal, and such other child or children as he should have living, or that his wife might be ensient with at the time of his death, until his said children should severally and respectively attain their several and respective ages of twenty-one years ; and when and as his said children should severally and respectively attain their said ages of twenty-one years, in trust to pay, assign, transfer, and convey all the said residue of his estate and effects, with the interest, dividends, and produce thereof, as should not have been applied for and towards the maintenance and education of his said children as aforesaid, or for putting any or either of them to business, or otherwise advancing any or either of them in life, pursuant to the power in his said will for that purpose afterwards contained, equally unto and amongst all his said children, when and as they should severally and respectively attain their said ages of twenty-one years ; and in case any or either of his said children should happen to die before having attained twenty-one years of age ; then in trust to pay, assign, transfer, and convey, all the said residue of his estate and effects, and the interest, dividends, and produce thereof, or such part thereof as should remain unapplied as aforesaid, unto such of his said children as should live to attain his, her, or their re-

- spective age or ages of twenty-one years, share and
2. share alike if more than one: AND whereas the said Charles Beal in and by his said will, did authorize and empower his said trustees to apply the respective part or share of any or either of his aforesaid children, of and in the said residue of his estate and effects, for putting any or either of them, his, her, or their lawful issue out to business, or any suitable employ, or for setting him, her, or them, up in business, or advancing him, her, or them, respectively in any employ or otherwise, for his, her, or their respective advancement in the world by marrying or otherwise howsoever; and the said testator nominated, constituted, and appointed the said trustees, the said David Evans and Francis Gifford, executors of his said last will and testament, as in and by the same, relation being thereunto had, what is hereinbefore in part
 3. recited will more fully and at large appear: AND whereas the said testator died without altering or revoking his said will, leaving his aforesaid three children, his only issue him surviving (all of whom are now living); and shortly after his death the said David Evans and Francis Gifford proved his said will in the prerogative court of Canterbury, and took upon them the said executorship
 4. and trust: AND whereas the said Amos Beal hath attained his said age of twenty-one years, and the said trustees have made up an account of and concerning the said residuary estate and effects, and all moneys received and paid by them, in pursuance of the said trust and executorship, whereby it appears they have advanced, paid, laid out, and expended, to, for, and on account of the said Amos Beal, the sum of 400*l.*; to, for, and on account of the said Hannah Beal, the sum of 300*l.*; and to, for, and on account of the said Jane Beal, the sum of 250*l.*; and that there is now remaining in their hands, and on good security as placed out by them, the sum of 1000*l.* of and belonging to the said residuary estate and effects of the said Charles Beal:
 5. AND whereas for making a just and equal division of the said sum of 1000*l.* among the aforesaid three children, pursuant to the said last will and testament of the said Charles Beal, it is agreed to add the aforesaid three several sums of 400*l.* 300*l.* and 250*l.* to the said sum of 1000*l.* which makes the same 1950*l.* and then to divide the whole into three equal shares, and deduct out of each third part what has respectively been advanced, paid, laid out, and expended, to, for, and on account of each child, whereby the share of the said Amos Beal therein appears to be the

6. sum of 250*l*. Now these presents witness, that as well for and in consideration of the said sum of 400*l*. heretofore advanced, paid, laid out, and expended, to, for, and on account of the said Amos Beal, as aforesaid, and of the said sum of 250*l*. to him in hand paid by the said David Evans and Francis Gifford, at or before the execution of these presents, the receipt whereof is hereby acknowledged, he the said Amos Beal, *hath* remised, released, and for ever discharged, and by these presents *doth*, remise, release, and for ever discharge the said David Evans and Francis Gifford, their executors, administrators, and assigns, of and from all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of him the said Amos Beal, of, in, and to the said residue of the estate and effects of the said Charles Beal deceased, by virtue of his said will or otherwise howsoever; and also, of and from all and all manner of action and actions, suits, bills, bonds, writings, obligations, debts, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, both at law and in equity, or otherwise howsoever, which against the said David Evans and Francis Gifford, or either of them, in their or either of their own right, or as trustees, or executors, constituted and appointed in and by the said last will and testament of the said Charles Beal deceased, or otherwise, he the said Amos Beal now hath, or ever had, or which he, his executors, administrators, or assigns, shall or may hereafter have, claim, challenge, or demand, for or by reason, or means, or on account thereof, or for or by reason, or means, or on account of the said residuary estate and effects of the said Charles Beal, or for or by reason, or means, of any act, matter, or thing, incident or relative thereto, from the beginning of the world to the day of the date hereof. (Save and except all such estate, right, title, and interest, as may accrue to him the said Amos Beal, or which he may at any time hereafter have, claim, challenge, or demand, of, in, or unto the said residuary estate and effects of the said Charles Beal deceased, or any part or parcel thereof, from, by, or on account of the death of both or either of the aforesaid Hannah and Jane Beal, which is not intended by these presents to be released): IN WITNESS whereof the said Amos Beal hath hereunto set his hand and seal, &c. [*as in* No. XI.]

NUMBER XIII.

Discharge for Legacies by Husband and Wife:—

TO ALL TO WHOM these presents shall come, Andrew Baker, of Milk-street, Cheapside, in the city of London, cordwainer, and Catharine his wife, send *greeting*. WHEREAS David Evans, late of Milk-street, aforesaid, victualler, in and by his last will and testament in writing, bearing date on or about the 8th day of June 1809, did give and bequeath unto the said Catharine, by her then name and description of his cousin Catharine Ford, spinster, the bed with a mahogany four-post bedstead, bolster and pillow, and the mahogany chest upon drawers, together with six hair bottom mahogany chairs, and pillow and claw mahogany table board, parcel of the furniture in the room over the dining-room, on the two pair of stairs in the dwelling-house of the said David Evans; and also did give and bequeath unto the said Catharine the sum of 100*l.*, and the said David Evans nominated and appointed George Hand and James Knowel, executors of his said will, who since his death have duly proved the same in the prerogative court of Canterbury: And whereas, since the death of the said David Evans, the said Catharine Ford hath intermarried with the said Andrew Baker: Now these presents witness, that the said Andrew Baker and Catharine his wife, do hereby acknowledge to have received of and from the said George Hand and James Knowel, the aforesaid bed, four-post bedstead, bolster and pillow, the mahogany chest upon drawers, the six mahogany chairs, and table board, and also the said sum of 100*l.* so given and bequeathed to the said Catharine, in and by the said last will and testament of the said David Evans as aforesaid: and thereof, and of and from every part thereof, do fully, clearly, and absolutely acquit, release, and for ever discharge, the said George Hand and James Knowel, their executors, administrators, and assigns, and also the estate and effects of the said testator, and every part thereof; And, in consideration thereof, they the said

* Where any legacy is given to a woman who marries before the same is paid or delivered to her, the husband should join in the discharge. So likewise if a legacy be given to a woman during her marriage, unless in either of those cases it should appear clear by the will that the husband can in no wise have any claim thereto, or interference therewith.

Andrew Baker, and Catharine his wife, do for themselves, their executors, administrators, and assigns, remise, and release, unto the said George Hand, and James Knowel, their executors and administrators all, and all manner of action and actions, cause and causes of action, suits, legacies, sum and sums of money, judgments, executions, claims, and demands whatsoever, both at law and in equity ; which against the said George Hand and James Knowel, their executors or administrators, or the estate or effects of the said testator, they the said Andrew Baker, and Catharine his wife, or either of them, ever had, or which they, their executors, administrators, or assigns, can or may have, claim, challenge, or demand, for, or by reason or means, or on account of the said furniture, or the said sum of 100*l.* given and bequeathed to the said Catharine, in and by the said last will and testament of the said David Evans as aforesaid. IN WITNESS whereof, the said Andrew Baker, and Catharine his wife, have hereunto set their hands and seals, &c. [as in No. XI. *only here, being two persons to execute, there must be two seals to the deed ; one for the husband to write his name opposite, and the other for the wife to write her name opposite thereto.*]

NUMBER XIV.

Release by a new Administrator on settling with and receiving Goods unadministered from the old.— To be written on paper or parchment, stamped as for any other Release.

TO ALL TO WHOM these presents shall come, Alexander Ball of Great Russel-street, Bloomsbury, in the county of Middlesex, gentleman (administrator *de bonis non*, of his late deceased mother Cecilia Ball,) sends *greeting*. WHEREAS Daniel Evans, uncle of the said Alexander Ball, did in the minority of the said Alexander Ball, take out letters of administration of the goods and chattels of the said Cecilia Ball deceased, for the benefit of the said Alexander Ball, and the other children of the said Cecilia Ball: And whereas the said Alexander Ball having attained the age of twenty-one years, the said Daniel Evans hath resigned up his administration so taken by him as aforesaid, and letters of administration, *de bonis non*, are granted to the said Alexander Ball of the said Cecilia Ball his mother, for himself and the benefit of his sisters and brother, Frances,

Gratia, and Henry Ball, children of the said Cecilia Ball deceased: And whereas the said Daniel Evans, and Alexander Ball, administrators as aforesaid, have now made up and adjusted all accounts, matters, and things, of and concerning all moneys received, paid, and disbursed, by the said Daniel Evans as administrator as aforesaid, and all other the estate whatsoever of or belonging to the said Cecilia Ball deceased, which have been received or come to the hands or disposition of the said Daniel Evans; and upon adjusting the said accounts there appears to be remaining in the hands of the said Daniel Evans the sum of 2000*l.* in money, and one bond under the hand and seal of James Knowel of — in the penal sum of 1000*l.* with a condition to be void upon the payment of 500*l.* on the day therein mentioned; which said sum of 2000*l.*, together with the said bond and all writings and papers appertaining or belonging to the estate of the said Cecilia Ball, the said Daniel Evans hath on the day of the date hereof paid and delivered up to the said Alexander Ball; Now know all by these presents, that the said Alexander Ball doth acknowledge to have received of and from the said Daniel Evans, the said sum of 2000*l.* together with the said bond, and all writings and papers appertaining or belonging to the estate of the said Cecilia Ball; and thereof, and of and from every part thereof, doth fully, clearly, and absolutely, acquit, release, and for ever discharge the said Daniel Evans, his heirs, executors, and administrators; And in consideration thereof, and being satisfied in the premises, *hath*, remised, released, and for ever discharged, and in and by these presents *doth*, remise, release, and for ever discharge the said Daniel Evans, his heirs, executors, and administrators, of and from all reckonings, accounts, sum and sums of money, by him had and received in pursuance of the said administration so granted to him as aforesaid, and of and from all other reckonings, accounts, and demands whatsoever, and all and every action and actions, cause and causes of action, suits, judgments, executions, claims and demands both at law and in equity, or otherwise howsoever; which against the said Daniel Evans, he the said Alexander Ball now hath, or ever had, or which he, his executors, or administrators, shall or may have, claim, challenge, or demand, for or on account of any act, matter, or thing whatsoever, from the beginning of the world to the day of the date of these presents. IN WITNESS whereof the said Alexander Ball hath hereunto set his hand and seal; &c. [as in No. XI.]

LIST OF STAMP DUTIES.

By the Statute 55 Geo. III. c. 184. the former Stamp Duties are repealed and the following new Duties are imposed.

Probate of a will, and letters of administration with a will annexed, to be granted in *England*;

Confirmation of any testamentary, or *eik* thereto, to be expedited in any commissary court in *Scotland*, where the deceased shall have died before or upon the 10th of October 1808, and subsequent to the 10th of October 1804;

Inventory to be exhibited and recorded in any commissary court in *Scotland*, of the estate and effects of any person deceased, who shall have died after the 10th of October 1808, and have left any testament or testamentary disposition of his or her personal or moveable estate and effects, or any part thereof:

Where the estate and effects for or in respect of which such probate, letters of administration, confirmation, or *eik* respectively, shall be granted or expedited, or whereof such inventory shall be exhibited and recorded, *exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially*, shall be

above the value of	20l. and under	100l.	duty	£.	s.	d.
of the value of	100l.	200l.	-	0	10	0
_____	200l.	300l.	-	2	0	0
_____	300l.	450l.	-	5	0	0
_____	450l.	600l.	-	8	0	0
_____	600l.	800l.	-	11	0	0
_____	800l.	1,000l.	-	15	0	0
_____	1,000l.	1,500l.	-	22	0	0
_____	1,500l.	2,000l.	-	30	0	0
_____	2,000l.	3,000l.	-	40	0	0
_____	3,000l.	4,000l.	-	50	0	0
_____	4,000l.	5,000l.	-	60	0	0
_____	5,000l.	6,000l.	-	80	0	0
_____	6,000l.	7,000l.	-	100	0	0
_____	7,000l.	8,000l.	-	120	0	0
_____	8,000l.	9,000l.	-	140	0	0
_____	9,000l.	10,000l.	-	160	0	0
_____	10,000l.	12,000l.	-	180	0	0
_____	12,000l.	14,000l.	-	200	0	0
_____	14,000l.	16,000l.	-	220	0	0
_____	16,000l.	18,000l.	-	250	0	0
_____	18,000l.	20,000l.	-	280	0	0
_____	20,000l.	25,000l.	-	310	0	0
_____	25,000l.	30,000l.	-	350	0	0
_____	30,000l.	35,000l.	-	400	0	0
_____				450	0	0

Probate, &c. — *continued.*

of the value of	35,000 <i>l.</i> and under	40,000 <i>l.</i>	duty	£	s.	d.
—	40,000 <i>l.</i>	45,000 <i>l.</i>	-	525	0	0
—	45,000 <i>l.</i>	50,000 <i>l.</i>	-	675	0	0
—	50,000 <i>l.</i>	60,000 <i>l.</i>	-	750	0	0
—	60,000 <i>l.</i>	70,000 <i>l.</i>	-	900	0	0
—	70,000 <i>l.</i>	80,000 <i>l.</i>	-	1,050	0	0
—	80,000 <i>l.</i>	90,000 <i>l.</i>	-	1,200	0	0
—	90,000 <i>l.</i>	100,000 <i>l.</i>	-	1,350	0	0
—	100,000 <i>l.</i>	120,000 <i>l.</i>	-	1,500	0	0
—	120,000 <i>l.</i>	140,000 <i>l.</i>	-	1,800	0	0
—	140,000 <i>l.</i>	160,000 <i>l.</i>	-	2,100	0	0
—	160,000 <i>l.</i>	180,000 <i>l.</i>	-	2,400	0	0
—	180,000 <i>l.</i>	200,000 <i>l.</i>	-	2,700	0	0
—	200,000 <i>l.</i>	250,000 <i>l.</i>	-	3,000	0	0
—	250,000 <i>l.</i>	300,000 <i>l.</i>	-	3,750	0	0
—	300,000 <i>l.</i>	350,000 <i>l.</i>	-	4,500	0	0
—	350,000 <i>l.</i>	400,000 <i>l.</i>	-	5,250	0	0
—	400,000 <i>l.</i>	500,000 <i>l.</i>	-	6,000	0	0
—	500,000 <i>l.</i>	600,000 <i>l.</i>	-	7,500	0	0
—	600,000 <i>l.</i>	700,000 <i>l.</i>	-	9,000	0	0
—	700,000 <i>l.</i>	800,000 <i>l.</i>	-	10,500	0	0
—	800,000 <i>l.</i>	900,000 <i>l.</i>	-	12,000	0	0
—	900,000 <i>l.</i>	1,000,000 <i>l.</i>	-	13,500	0	0
—	1,000,000 <i>l.</i> and upwards	-	-	15,000	0	0

Letters of administration, without a will annexed, to be granted in *England*;

Confirmation of any testament dative, to be expedited in any commissary court in *Scotland*, where the deceased shall have died before or upon the 10th of October 1808, and subsequent to the 10th of October 1804;

Inventory to be exhibited and recorded in any commissary court in *Scotland*, of the estate and effects of any person deceased, who shall have died after the 10th of October 1808, without leaving any testament or testamentary disposition of his or her personal or moveable estate or effects, or any part thereof;

Where the estate and effects for or in respect of which such letters of administration or confirmation respectively shall be granted or expedited, or whereof such inventory shall be exhibited and recorded, *exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially*, shall be

above the value of	20 <i>l.</i> and under	50 <i>l.</i>	duty	£	s.	d.
of the value of	50 <i>l.</i>	100 <i>l.</i>	-	0	10	0
—	100 <i>l.</i>	200 <i>l.</i>	-	1	0	0
—	200 <i>l.</i>	300 <i>l.</i>	-	3	0	0
—	300 <i>l.</i>	450 <i>l.</i>	-	8	0	0
—	—	—	—	11	0	0

Letters of Administration, &c. — continued.

of the value of	450 <i>l.</i> and under	600 <i>l.</i>	duty	£.	s.	d.
_____	600 <i>l.</i>	800 <i>l.</i>	-	22	0	0
_____	800 <i>l.</i>	1,000 <i>l.</i>	-	30	0	0
_____	1,000 <i>l.</i>	1,500 <i>l.</i>	-	45	0	0
_____	1,500 <i>l.</i>	2,000 <i>l.</i>	-	60	0	0
_____	2,000 <i>l.</i>	3,000 <i>l.</i>	-	75	0	0
_____	3,000 <i>l.</i>	4,000 <i>l.</i>	-	90	0	0
_____	4,000 <i>l.</i>	5,000 <i>l.</i>	-	120	0	0
_____	5,000 <i>l.</i>	6,000 <i>l.</i>	-	150	0	0
_____	6,000 <i>l.</i>	7,000 <i>l.</i>	-	180	0	0
_____	7,000 <i>l.</i>	8,000 <i>l.</i>	-	210	0	0
_____	8,000 <i>l.</i>	9,000 <i>l.</i>	-	240	0	0
_____	9,000 <i>l.</i>	10,000 <i>l.</i>	-	270	0	0
_____	10,000 <i>l.</i>	12,000 <i>l.</i>	-	300	0	0
_____	12,000 <i>l.</i>	14,000 <i>l.</i>	-	330	0	0
_____	14,000 <i>l.</i>	16,000 <i>l.</i>	-	375	0	0
_____	16,000 <i>l.</i>	18,000 <i>l.</i>	-	420	0	0
_____	18,000 <i>l.</i>	20,000 <i>l.</i>	-	465	0	0
_____	20,000 <i>l.</i>	25,000 <i>l.</i>	-	525	0	0
_____	25,000 <i>l.</i>	30,000 <i>l.</i>	-	600	0	0
_____	30,000 <i>l.</i>	35,000 <i>l.</i>	-	675	0	0
_____	35,000 <i>l.</i>	40,000 <i>l.</i>	-	785	0	0
_____	40,000 <i>l.</i>	45,000 <i>l.</i>	-	900	0	0
_____	45,000 <i>l.</i>	50,000 <i>l.</i>	-	1,010	0	0
_____	50,000 <i>l.</i>	60,000 <i>l.</i>	-	1,125	0	0
_____	60,000 <i>l.</i>	70,000 <i>l.</i>	-	1,350	0	0
_____	70,000 <i>l.</i>	80,000 <i>l.</i>	-	1,575	0	0
_____	80,000 <i>l.</i>	90,000 <i>l.</i>	-	1,800	0	0
_____	90,000 <i>l.</i>	100,000 <i>l.</i>	-	2,025	0	0
_____	100,000 <i>l.</i>	120,000 <i>l.</i>	-	2,250	0	0
_____	120,000 <i>l.</i>	140,000 <i>l.</i>	-	2,700	0	0
_____	140,000 <i>l.</i>	160,000 <i>l.</i>	-	3,150	0	0
_____	160,000 <i>l.</i>	180,000 <i>l.</i>	-	3,600	0	0
_____	180,000 <i>l.</i>	200,000 <i>l.</i>	-	4,050	0	0
_____	200,000 <i>l.</i>	250,000 <i>l.</i>	-	4,500	0	0
_____	250,000 <i>l.</i>	300,000 <i>l.</i>	-	5,620	0	0
_____	300,000 <i>l.</i>	350,000 <i>l.</i>	-	6,750	0	0
_____	350,000 <i>l.</i>	400,000 <i>l.</i>	-	7,875	0	0
_____	400,000 <i>l.</i>	500,000 <i>l.</i>	-	9,000	0	0
_____	500,000 <i>l.</i>	600,000 <i>l.</i>	-	11,250	0	0
_____	600,000 <i>l.</i>	700,000 <i>l.</i>	-	13,500	0	0
_____	700,000 <i>l.</i>	800,000 <i>l.</i>	-	15,750	0	0
_____	800,000 <i>l.</i>	900,000 <i>l.</i>	-	18,000	0	0
_____	900,000 <i>l.</i>	1,000,000 <i>l.</i>	-	20,250	0	0
_____	1,000,000 <i>l.</i> and upwards		-	22,500	0	0

EXEMPTIONS FROM ALL STAMP DUTIES.

Probate of will, letters of administration, confirmation of testament, and oik thereto, and inventory of the effects of any common seaman, marine, or soldier, who shall be slain or die in the service of His Majesty, his heirs or successors:

Additional inventory to be exhibited and recorded in any commissary court in Scotland; where the same shall not be liable to a duty of greater amount than the duty already paid upon any former inventory exhibited and recorded of the estate and effects of the same person.

LEGACIES AND SUCCESSIONS TO PERSONAL OR MOVEABLE ESTATE UPON INTESTACY.

I. Where the Testator, Testatrix, or Intestate died before or upon the 5th of April 1805.

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or upon the 5th of April 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged, after the 31st of August 1815.

Also for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate of any person who died before or upon the 5th of April 1805 (after deducting debts, funeral expences, legacies, and other charges first payable thereout), whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the shall be paid, delivered, retained, satisfied, or discharged, after the 31st of August 1815.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of the deceased, or any descendant of a brother or sister of the deceased*; a duty at and after the rate of 2*l.* 10*s.* *per centum* on the amount or value thereof.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of a *brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased*; a duty at and after the rate of 4*l.* *per centum* on the amount or value thereof.

Where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the

benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased; a duty at and after the rate of 5*l.* per centum on the amount or value thereof.

And where any such legacy, or residue, or share of such residue, shall have been given, or have devolved, to or for the benefit of any person, in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of any stranger in blood to the deceased; a duty at and after the rate of 8*l.* per centum on the amount or value thereof.

II. *Where the Testator, Testatrix, or Intestate, shall have died after the 5th of April 1805.*

For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person, who shall have died after the 5th of April 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st of August 1815.

Also, for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving to two or more persons), of the personal or moveable estate of any person, who shall have died after the 5th of April 1805, (after deducting debts, funeral expences, legacies, and other charges first payable thereout,) whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the amount or value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st of August 1815.

And also for the clear residue (when given to one person), and for every share of the clear residue (when given to two or more persons), of the monies to arise from the sale, mortgage, or other disposition, of any real or heritable

estate directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument of any person, who shall have died after the 5th of April 1805 (after deducting debts, funeral expences, legacies, and other charges first made payable thereout, if any), where such residue, or share of residue, shall amount to 20*l.* or upwards, and where the same shall be paid, retained, or discharged after the 31st of August 1815.

Where any such legacy or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a child of the deceased, or any descendant of a child of the deceased, or to or for the benefit of the father or mother, or any lineal ancestor of the deceased*; a duty at and after the rate of 1*l.* per centum on the amount or value thereof.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the deceased, or any descendant of a brother or sister of the deceased*; a duty at and after the rate of 3*l.* per centum on the amount or value thereof.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of the father or mother of the deceased, or any descendant of a brother or sister of the father or mother of the deceased*; a duty at and after the rate of 5*l.* per centum on the amount or value thereof.

Where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of *a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased*; a duty at and after the rate of 6*l.* per centum on the amount or value thereof.

And where any such legacy, or residue, or any share of such residue, shall have been given, or have devolved, to or for the benefit of any person, in any other degree of collateral consanguinity to the deceased than is above described, or to or for the benefit of *any stranger in blood to the deceased*; a duty at and after the rate of 10*l.* per centum on the amount or value thereof.

And all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or

effects as aforesaid, shall be deemed legacies within the intent and meaning of this schedule.

And where any legatee shall take two or more distinct legacies or benefits, under any will or testamentary instrument, which shall together be of the amount or value of 20*l.* each shall be charged with duty, though each or either may be separately under that amount or value.

EXEMPTIONS.

Legacies and residues, or shares of residue, of any such estate or effects as aforesaid, given or devolving to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the Royal Family.

And all legacies which were exempted from duty by the act passed in 39 Geo. 3. c. 73., for exempting certain specific legacies given to bodies corporate, or other public bodies, from the payment of duty.

By sect. 2. it is enacted, that there shall be raised, levied, and paid unto and for the use of His Majesty, his heirs and successors, in and throughout the whole of Great Britain, for and in respect of the several instruments, matters, and things mentioned and described in the schedule hereunto annexed (except those standing under the head of exemptions), or for or in respect of the vellum, parchment, or paper, upon which such instruments, matters, and things, or any of them, shall be written or printed, the several duties or sums of money set down in figures against the same respectively, or otherwise specified and set forth in the same schedule; and that the yearly *per centage* duty on insurances from loss by fire therein mentioned, shall commence and take place from and after the 28th of September 1815; and that all the other duties therein mentioned, shall commence and take place from and after the 31st of August 1815; and that the said schedule, and all the provisions, regulations, and directions therein contained, with respect to the said duties, and the instruments, matters, and things charged therewith, shall be deemed and taken to be part of this act, and shall be read and construed as if the same had been inserted herein at this place, and shall be applied, observed, and put in execution accordingly.

By sect. 37. it is enacted, that from and after the 31st of August 1815, if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining

probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of 100*l.*, and also a further sum, at and after the rate of 10*l. per centum* on the amount of the stamp duty payable on the probate of the will or letters of administration of the estate and effects of the deceased.

Sect. 38. That from and after the expiration of three calendar months from the passing of this act, no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the case of Quakers, that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting any thing on account of the debts due and owing from the deceased, are under the value of a certain sum to be therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp duty may be paid on such probate or letters of administration; which affidavit or affirmation shall be made before the surrogate or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased.

Sect. 39. That every such affidavit or affirmation shall be exempt from stamp duty, and shall be transmitted to the said commissioners of stamps, together with the copy of the will, or extract, or account of the letters of administration to which it shall relate, by the registrar, or other officer of the court, whose duty it shall be to transmit copies of wills, and extracts or accounts of letters of administration, to the said commissioners, for the better collection of the duties on legacies and successions to personal estate upon intestacy; and if any registrar or other officer, whose duty

it shall be, shall neglect to transmit such affidavit or affirmation to the said commissioners of stamps, as hereby directed, every person so offending shall forfeit the sum of 50*l*.

Sect. 40. That from and after the passing of this act, where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of greater value than the same shall have afterwards proved to be, and shall in consequence have paid too high a stamp duty thereon, if such person shall produce the probate or letters of administration to the said commissioners of stamps, within six calendar months after the true value of the estate and effects shall have been ascertained, and it shall be discovered that too high a duty was first paid on the probate or letters of administration, and shall deliver to them a particular inventory and account, and valuation of the estate and effects of the deceased, verified by an affidavit, or solemn affirmation in the case of Quakers; and if it should thereupon satisfactorily appear to the said commissioners that a greater stamp duty was paid on the probate or letters of administration than the law required, it shall be lawful for the said commissioners to cancel and expunge the stamp on the probate or letters of administration, and to substitute another stamp for denoting the duty which ought to have been paid thereon, and to make an allowance for the difference between them, as in the cases of spoiled stamps, or if the difference be considerable, to repay the same in money, at the discretion of the said commissioners.

Sect. 41. That from and after the passing of this act, where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of less value than the same shall have afterwards proved to be, and shall in consequence have paid too little stamp duty thereon, it shall be lawful for the said commissioners of stamps, on delivery to them of an affidavit or solemn affirmation of the value of the estate and effects of the deceased, to cause the probate or letters of administration to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value, and of the further sum or penalty payable by law for stamping deeds after the execution thereof, without any deduction or allowance of the stamp duty originally paid on such probate or letters of administration:

provided always, that if the application shall be made within six calendar months after the true value of the estate and effects shall be ascertained, and it shall be discovered that too little duty was at first paid on the probate or letters of administration, and if it shall appear by affidavit or solemn affirmation, to the satisfaction of the said commissioners, that such duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, and without any intention of fraud, or to delay the payment of the full and proper duty, then it shall be lawful for the said commissioners to remit the before-mentioned penalty, and to cause the probate or letters of administration to be duly stamped, on payment only of the sum which shall be wanting to make up the duty which ought to have been at first paid thereon.

Sect. 42. That in cases of letters of administration on which too little stamp duty shall have been paid at first, the said commissioners of stamps shall not cause the same to be duly stamped in the manner aforesaid, until the administrator shall have given such security to the ecclesiastical court or ordinary by whom the letters of administration shall have been granted, as ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained, and also that the said commissioners of stamps shall yearly or oftener transmit an account of the probates and letters of administration, upon which the stamps shall have been rectified in pursuance of this act, to the several ecclesiastical courts by which the same shall have been granted, together with the value of the estate and effects of the deceased, upon which such rectification shall have proceeded.

Sect. 43. That where too little duty shall have been paid on any probate or letters of administration, in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, if any executor or administrator acting under such probate or letters of administration shall not, within six calendar months after the passing of this act, or after the discovery of the mistake or misapprehension, or of any estate or effects not known at the time to have belonged to the deceased, apply to the said commissioners of stamps, and pay what shall be wanting to make up the duty which ought to have been paid at first on such probate or letters of administration, he or she shall forfeit the sum of

100%, and also a further sum, at and after the rate of 10% *per centum* on the amount of the sum wanting to make up the proper duty.

Sect. 44. That from and after the expiration of three calendar months from the passing of this act, it shall not be lawful for any ecclesiastical court or person to call in and revoke, or to accept the surrender of any probate or letters of administration, on the ground only of too high or too low a stamp duty having been paid thereon, as heretofore hath been practised; and if any ecclesiastical court or person shall so do, the commissioners of stamps shall not make any allowance whatever for the stamp duty on the probate or letters of administration which shall be so annulled.

Sect. 45. And whereas it has happened in the case of letters of administration on which the proper stamp duty hath not been paid at first, that certain debts, chattels real or other effects, due or belonging to the deceased, have been found to be of such great value, that the administrator hath not been possessed of money sufficient either of his own or of the deceased to pay the requisite stamp duty, in order to render such letters of administration available for the recovery thereof by law; and whereas the like may occur again, and it may also happen that executors or persons entitled to take out letters of administration may, before obtaining probate of the will or letters of administration of the estate and effects of the deceased, find some considerable part or parts of the estate and effects of the deceased so circumstanced as not to be immediately got possession of, and may not have money sufficient either of their own or of the deceased to pay the stamp duty on the probate or letters of administration which it shall be necessary to obtain; it is enacted, that from and after the passing of this act, it shall be lawful for the said commissioners of stamps, on satisfactory proof of the facts by affidavit or solemn affirmation, in any such case as aforesaid which may appear to them to require relief, to cause the probate or letters of administration to be duly stamped, for denoting the duty payable or which ought originally to have been paid thereon, and to give credit for the duty, either upon payment of the before-mentioned penalty, or without, in cases of probates or letters of administration already obtained, and upon which too little duty shall have been paid, and either with or without allowance of the stamp duty already paid thereon, as the case may require, under the provisions of this act; provided in

all such cases of credit that security be first given by the executors or administrators, together with two or more sufficient sureties to be approved of by the said commissioners, by a bond to his majesty, his heirs, or successors, in double the amount of the duty, for the due and full payment of the sum for which credit shall be given, within six calendar months, or any less period, and of the interest for the same, at the rate of 10*l. per cent. per annum*, from the expiration of such period until payment thereof, in case of any default of payment at the time appointed; and such probate or letters of administration being duly stamped in the manner aforesaid, shall be as valid and available as if the proper duty had been at first paid thereon, and the same had been stamped accordingly.

Sect. 46. Provided, that if at the expiration of the time to be allowed for the payment of the duty on such probate or letters of administration, it shall appear to the satisfaction of the said commissioners, that the executor or administrator to whom such credit shall be given as aforesaid, shall not have recovered effects of the deceased to an amount sufficient for the payment of the duty, it shall be lawful for the said commissioners to give such further time for the payment thereof, and upon such terms and conditions as they shall think expedient.

Sect. 47. Provided also, that the probate or letters of administration so to be stamped on credit as aforesaid, shall be deposited with the said commissioners of stamps, and shall not be delivered up to the executor or administrator until payment of the duty, together with such interest as aforesaid, if any shall become due; but the same shall nevertheless be produced in evidence by some officer of the commissioners of stamps, at the expence of the executor or administrator, as occasion shall require.

Sect. 48. That the duty for which credit shall be given as aforesaid, shall be a debt to his majesty, his heirs, or successors, from the personal estate of the deceased, and shall be paid in preference to and before any other debt whatsoever due from the same estate; and if any executor or administrator of the estate of the deceased shall pay any other debt in preference thereto, he or she shall not only be charged with and be liable to pay the duty out of his or her own estate, but shall also forfeit the sum of 500*l.*

Sect. 49. That if before payment of the duty for which credit shall be given in any such case as aforesaid, it shall

become necessary to take out letters of administration *de bonis non* of the deceased, it shall also be lawful for the said commissioners to cause such letters of administration *de bonis non*, to be duly stamped with the particular stamp provided to be used on letters of administration of that kind, for denoting the payment of the duty in respect of the effects of the deceased, on some prior probate or letters of administration of the same effects, in such and the same manner as if the duty had been actually paid, upon having the letters of administration *de bonis non* deposited with the said commissioners, and upon having such further security for the payment of the duty as they shall think expedient; and such letters of administration shall be as valid and available as if the duty for which credit shall be given had been paid.

Sect. 50. In regard to probate of wills and letters of administration, that where any part of the personal estate which the deceased was possessed of or entitled to, shall be alleged to have been trust property, if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conformably to the provisions of the said act of 48 G. 3., shall reside out of England, such affidavit or affirmation shall and may be made before any person duly commissioned to take affidavits by the Court of Session or Court of Exchequer in Scotland, or before one of His Majesty's justices of the peace in Scotland, or before a master in chancery ordinary or extraordinary in Ireland, or before any judge or civil magistrate of any other country or place where the party or parties shall happen to reside; and every such affidavit or affirmation shall be as effectual as if the same had been made before a master in chancery in England, pursuant to the directions of the said last-mentioned act.

Sect. 51. Provided, that where it shall be proved by oath or proper vouchers to the satisfaction of the said commissioners of stamps, that an executor or administrator hath paid debts due and owing from the deceased, and payable by law out of his or her personal or moveable estate, to such an amount as being deducted from the amount or value of the estate and effects of the deceased, for or in respect of which a probate or letters of administration, or a compensation of a testament, testamentary or dative, shall have been granted after 31st August 1815, or which shall be included in any inventory exhibited and recorded in a commissary court in Scotland as the law requires, after that day, shall

reduce the same to a sum, which, if it had been the whole gross amount or value of such estate and effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration, or confirmation, or inventory, than shall have been actually paid thereon under and by virtue of this act, it shall be lawful for the said commissioners to return the difference, provided the same shall be claimed within three years after the date of such probate or letters of administration or confirmation, or the recording of such confirmation as aforesaid; but where by reason of any proceeding at law or in equity, the debts due from the deceased shall not have been ascertained and paid, or the effects of the deceased shall not have been recovered and made available, and in consequence thereof the executor or administrator shall be prevented from claiming such return of duty as aforesaid within the said term of three years, it shall be lawful for the commissioners of the treasury to allow such further time for making the claim, as may appear to them to be reasonable under the circumstances of the case.

By sect. 8. it is enacted, that the powers and provisions of former acts shall be put in execution, with regard to the duties under this act. It is therefore necessary to recur to the statutes 36 Geo. 3. 45 Geo. 3. and 48 Geo. 3.

By the stat. 36 Geo. 3. c. 52. sect. 7., it is enacted, that any gift by will, to be satisfied out of the personal estate of the testator, or out of any personal estate which he shall have power to dispose of, shall be deemed a legacy, whether given by way of annuity or in any other form, and whether charged only on personal estate, or also on real estate; except so far as it shall be paid out of real estate, in a due execution of the will; and every donation *mortis causa*, shall be deemed a legacy.

Sect. 8. That the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be charged according to tables in the schedule annexed to that act; and the duty shall be paid by four equal payments, the first of which payments shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively, before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of such annuity, if determinable upon any contingency besides the death of any person, shall be calculated without

regard to such contingency : provided, that if such annuity determine by death before four years' payment shall become due, then the duty shall be payable in proportion only to so many of the payments as actually became due ; and in case such annuity shall determine upon any other contingency, then not only all payments of duty which would otherwise become due shall cease, but the person who shall have paid any duties which shall have previously become due, may obtain a return of so much duty as will reduce the same to the like duty as would have been payable for such annuity, calculated according to the term for which the same shall have endured ; which abatement the commissioners shall settle according to the tables in the schedule,

Sect. 9. That the value of any annuity payable out of any legacy, shall be calculated, and the duty charged thereon, in the same manner as directed with respect to other annuities ; and the duty on the legacy, if any duty shall be payable for it, shall be calculated on the value of such legacy, after deducting the value of such annuity ; and the duty for such annuity shall be paid by the person entitled to the legacy, subject to the like proviso in case such annuity shall determine before four years' payment shall become due ; and the payment which shall be made for such duty shall be retained out of the first four years' payments of such annuity, if so many shall become due, or out of so many of such payments as shall become due by equal portions.

Sect. 10. That the duty upon any legacy given to purchase an annuity of a certain amount, shall be calculated upon the sum necessary to purchase such annuity according to the tables before-mentioned, and shall be deducted from such sum, and paid as in the case of other pecuniary legacies ; and the annuity to be purchased shall be reduced in proportion to the duty payable thereon.

Sect. 11. That if any benefit shall be given in such terms that the amount or value can only be ascertained from time to time by the actual application of the fund ; or if the amount or value of any benefit cannot, by reason of the form and manner of the gift, be so ascertained that the duty can be charged thereon under any other of the directions herein contained ; then such duty shall be charged upon the sums or effects which shall be applied from time to time for the purposes directed, as separate and distinct legacies, and shall be paid out of the fund applicable for such purposes, or charged with answering the same.

Sect. 12. That the duty on a legacy or residue to be enjoyed by different persons in succession, who shall be chargeable with the duties at the same rate, shall be paid as in the case of a legacy to one person; and where any legacy given, so that the same shall be enjoyed by different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged, all persons who shall be entitled for life only or any other temporary interest, shall be chargeable with the duty in respect of such bequest, in the same manner as if the annual produce thereof had been given by way of annuity; and such persons respectively shall be so chargeable with such duty, and the same shall be payable when they shall respectively become entitled to and begin to receive such produce, and shall be paid by equal portions during the term of four years, if they shall so long continue to receive such produce; and all persons who shall become absolutely entitled to such legacy so to be enjoyed in succession, shall, when they begin to enjoy the benefit thereof, pay the duty for the same, or such part thereof of which the benefit shall be so enjoyed, in the same manner as if the same had come to them immediately.

Sect. 13. That the duty on any legacy or residue to be enjoyed by different persons in succession, upon whom the duty shall be chargeable at the same rate, shall be deducted and paid by the executor or administrator, upon payment of such legacy or residue, to any trustee; and if the same shall not be paid to any trustee, such duty shall be paid out of the capital of the property so given, upon receipt, by any of the persons so intitled in succession, of any produce of such capital, or any part thereof, according to the amount of the capital of which such produce shall be so received; and where the duty shall be chargeable at different rates, the executor or administrator shall be chargeable with such duties in succession, in the same manner as in case of immediate bequest; unless the property bequeathed shall have been vested in trustees, in which case such trustees shall be chargeable with the duties as if they were executors or administrators; and where any partial interest shall be given, or shall arise out of any such property so to be enjoyed in succession, and such partial interest shall be paid by the person enjoying such property, such person shall be chargeable with the duties for such partial interest, and shall retain

and pay the same as if he were executor; and shall be debtor to the king for it as executor.

Sect. 14. That no duty shall be paid on plate, furniture, or other things, not yielding any income, and given to persons in succession, till the same shall be actually sold, or shall come to any person having power to sell, or having an absolute interest therein, and shall be then charged on that person only, and not on the executor by reason of his having assented to such bequest.

Sect. 15. That where different persons shall become entitled to a legacy in succession, the duty shall be charged thereon, as given to be enjoyed in succession, whether the person entitled thereto shall take the same under a will, or as entitled by intestacy.

Sect. 16. That where any legacy shall be given to persons in joint tenancy, some or one of whom shall be chargeable with any duty, and some or one of whom shall not be so chargeable, the persons chargeable shall pay such duty in proportion to their interest; and if any persons chargeable shall become entitled by survivorship, or by severance, to any larger interest in the property bequeathed, such persons shall be charged with the same duty as if the property to which such joint-tenants shall so become entitled had been originally given to such persons only.

Sect. 17. That when any legacy shall be given, subject to any contingency whereupon the same may go to some other person, such bequest (unless chargeable as an annuity) shall be charged with duty as an absolute bequest, and such duty shall be paid out of the capital of such legacy, notwithstanding the same may, upon such contingency, go to some person not chargeable with the same, or with any duty; and if such contingency shall afterwards happen, and the property so bequeathed shall thereupon go in such manner that the same, if taken immediately after the death of the testator, under the same title would have been chargeable with a higher rate of duty than the duty so paid, the person becoming entitled thereto, shall be charged with and shall pay the difference between the duty so paid, and such higher rate of duty.

Sect. 18. That where any legacy shall be subjected to any power of appointment for the benefit of any persons specially named as objects of such power, such property shall be charged with duty as property given in succession; and all persons shall be charged in respect of their several interests, whether previous or subject to, or under or in de-

fault of such appointment ; and where any property shall be given for any limited interest, and an absolute power of appointment shall also be given to any person to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty as if the same property had been immediately given to the person executing such power, after allowing any duty before paid in respect thereof ; and where property shall be given with any such general power of appointment, which property in default of appointment will belong to the person to whom such power shall be given, such property shall be charged with, and shall pay the duty by this act imposed, in the same manner as if such property had been given to such person absolutely in the first instance, without such power of appointment.

Sect. 19. That money or personal estate, directed to be applied in the purchase of real estate, shall pay duty as personal estate ; unless the same shall be given to be enjoyed in succession, and then each person entitled thereto in succession, shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued ; provided, that in case before the same shall be so applied, any person shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, the same duty shall be paid thereon as would have been payable on general personal estate.

Sect. 20. That estates *pur autre vie*, applicable by law as personal estate, shall be charged with the duties as personal estate.

Sect. 21. That money given by will to pay the legacy duty shall not be charged with the duty.

Sect. 22. That where specific legacies, and the residue of personal estate, shall consist of property not reduced into money, the executor or administrator may set a value thereon, and offer to pay the duty according to such value ; or may require the commissioners to appoint a person to set such value, at the expence of the person or persons by whom such duty ought to be paid ; and the commissioners may accept the duty offered to be paid ; but if the commissioners shall not be satisfied with the value so set, on which the duty shall be so offered, they may appoint a person to appraise, and may assess the duty payable in respect thereof,

and require the same to be paid; but the parties may cause that appraisement to be reviewed by the commissioners of the land-tax for the district where such effects shall be, at their next meeting, if fourteen days shall have intervened, and if not, then at the next succeeding meeting of the said commissioners, of which appeal six days' notice shall be given to the commissioners of stamps; and the commissioners of the land-tax may appoint a person to appraise such effects, and hear such appeal, and their judgment shall be final; and if the valuation of the commissioners of stamps shall not be appealed from within the time aforesaid, or shall be affirmed upon appeal, the duty shall be paid according to such valuation; and if any variation shall be made on such appeal, the duty shall be paid according to such variation; and if the duty assessed in manner aforesaid, shall exceed the duty first offered, the expence of such appraisement and other proceedings in assessing such duty shall be borne by the person by whom such duty shall be payable; and if any dispute shall arise between any person entitled to any such legacy or residue, and the executor or administrator, with respect to the value thereof, or the duty to be paid thereon, the duty shall be assessed by the commissioners of stamps, or the commissioners of land-tax, upon appeal as before; and in case the effects shall be ten miles from London, a person deputed by the said commissioners shall act in their stead, but subject to their instructions and controul.

Sect. 23. That where any legacy shall be satisfied otherwise than by payment of money, or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount thereof, the duty shall be paid according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same: provided, that if any legacy or bequest shall be made in satisfaction of any other legacy or bequest unpaid, the duty shall not be paid on both subjects, although both may be chargeable with duty, but shall be paid on the subject yielding the largest duty.

Sect. 24. That where an executor or administrator shall offer to pay or deliver any legacy or residue, deducting the duty payable thereon, and the person entitled shall refuse to accept such offer, and to give a release and discharge for such legacy or residue, then, although no actual tender be made, if any suit shall be afterwards instituted, the court may order all costs to be paid by the person who refused, or may

order such costs to be retained out of such legacy, together with the duty payable thereon, as the said court shall see fit; and in case of a suit for a legacy or residue, the court may, in a summary way, order payment of such legacy or residue, and the duty and costs.

Sect. 25. That if any suit shall be instituted concerning the administration of the personal estate of any person dying testate or intestate, in which any direction shall be given touching the payment of any legacies or residue, the court shall, in giving directions concerning the same, provide for the due payment of the duties; and in all accounts of personal estate, such court shall take care that no allowance be made in respect of any legacy or residue, without proof of the payment of the duties.

Sect. 26. That an executor or administrator may pay or deliver any legacy, or any part of any legacy, or make distribution of any part of the personal estate, on payment of such proportions of the duty as shall accrue in respect of such part of such personal estate as shall be so administered.

Sect. 27. That no executor or administrator, or trustee, shall pay, deliver, or satisfy, or compound for any legacy, or residue of any personal estate, or any part thereof, in respect whereof any duty is thereby imposed, without taking a receipt in writing, expressing the date of such receipt, and the names of the testator or intestate, and of the person to whom such receipt shall be given, and of the person to whom such legacy or residue, or part of residue, shall have been given, or shall have belonged, and the amount of the legacy or residue, or part of residue, and also the amount and rate of the duty payable and allowed thereon; and that no written receipt shall be received in evidence, unless stamped as required by that act; and no evidence shall be given of payment of such legacy, or residue, or any part thereof, without producing such receipt stamped, unless payment of the duty shall first be given in evidence: provided, that a copy of the entry, in the books of the commissioners, of the payment of such duty, shall be admitted as evidence thereof: provided also, that payment of any annuity, or legacy charged as an annuity, shall not be deemed a payment for which such stamped receipt shall be required, except the several payments which shall complete the payments for each of the first four years during which such annuity shall be payable.

Sect. 28. That any executor or administrator, or trustee,

who shall pay or satisfy, or compound for any legacy or residue, without taking such receipt as aforesaid, and causing the same to be stamped within the time allowed, shall forfeit 10*l. per centum* on the money or value for which such receipt ought to have been given; and all persons receiving the benefit of any such money, or other property, without giving a written receipt for the same, in which the duty shall be expressed to have been allowed or paid, and which shall bear date on the day of signing, shall forfeit 10*l. per centum* on the money or value of the property so received.

Sect. 29. That every such receipt shall be brought, within twenty-one days after the date thereof, to the head office of the commissioners, or to some other office appointed by the commissioners, to be stamped, paying the duty for the same, and upon such payment, the proper officer shall write upon such receipt an acknowledgment of the duty paid in words at length, and bearing date the day on which such payment shall be made, and shall subscribe his name thereto, and enter an account in a book; and the receipt shall be forthwith stamped with one of the four stamps; and in case the duty shall be paid at any other office to be appointed by the commissioners, the receipt whereon such acknowledgment of the payment of duty shall be subscribed, shall be transmitted within twenty-one days to the head office to be stamped; and such officer shall sign an acknowledgment, that such receipt has been left with him for such purpose, and such officer shall deliver back the same legacy receipt stamped, upon re-delivery to him of the acknowledgment: provided, that if any such receipt shall not be brought to any such office within twenty-one days, it shall be lawful to carry such receipt to the head office, within three calendar months after date, paying the duty, and 10*l. per centum* on such duty, by way of penalty, and the receipt may then be stamped, but the commissioners shall not on any pretence, except as after directed, stamp any receipt unless the duty shall be paid, and such receipt shall be produced to be stamped within the times and in the manner respectively limited.

Sect. 30. That if it shall appear to the satisfaction of the commissioners, upon oath or affirmation, to be administered by a justice of the peace, or master or masters extraordinary in chancery, that less duty has been paid for any legacy or residue, than ought to have been paid, by mistake, without any intention to defraud; and if application be made to the commissioners to rectify such mistake before any

suit, and within three calendar months after payment of the money actually paid, it shall be lawful for the commissioners to accept the difference, together with 10*l. per centum* on such difference, by way of penalty, in full for the duty, and which shall be in discharge of all penalties, and to cause an acknowledgment to be written on the receipt, and also to cause such receipt to be properly stamped.

Sect. 31. That the party paying or satisfying any legacy, or residue, contrary to the provisions of that act, who shall within twelve calendar months after the offence committed, discover the other party offending, so that such party be thereupon convicted, such person so discovering shall be discharged from all penalties incurred.

Sect. 32. That where, by reason of the infancy, or absence beyond the seas, of a legatee, or party in distribution, the executor or administrator cannot pay such legacy or residue, although he may have the same, he may pay such legacy, or residue, after deducting the duty, into the bank, with the privity of the accountant general of the court of chancery, to be placed to the account of the person for whose benefit the same shall be paid; for payment of which money the accountant general shall give his certificate on production of the certificate of the commissioners that the duty has been paid; and such payment shall be a sufficient discharge; and such money shall be laid out by the accountant general, without any formal request, in the purchase of 3*l. per centum* consolidated annuities, which, with the dividends thereon, shall be transferred to the person entitled, on application to the court of chancery, by petition or motion, in a summary way: provided, that if it afterwards appear that such money has been improperly paid into the bank, it shall also be lawful for the court of chancery, upon petition, in a summary way to dispose thereof: provided also, that if it shall appear that the duty paid was more than ought to have been paid, it shall be lawful for the person who shall have paid such duty, to apply to the commissioners to repay such excess of duty; and the commissioners are hereby authorised to repay such excess; and if the duty paid appear to be less than the duty which ought to have been paid, it shall be lawful for the person who paid such money into the bank, upon payment of the full duty to the commissioners, with such penalties, if any, as ought to be paid in respect thereof, to apply to the court of chancery, in a summary way, for the repayment of the further sum paid to the commissioners for duty, out of the money in the bank.

Sect. 33. That if at the end of two years after the death of any person deceased, it shall appear to the commissioners, that it will require time to collect the debts or effects, or that from circumstances it will be difficult to ascertain or adjust the amount of the residue, and the parties interested shall be desirous of compounding for the duty, it shall be lawful for such parties, with the consent of the commissioners, to make application to the court of exchequer at Westminster, if the deceased person resided in England, and to the court of exchequer in Scotland, if the deceased person resided in Scotland, for leave to compound such duty.

Sect. 34. That if at any time after payment of duty on any legacy, or residue, any legatee or party entitled shall be obliged to refund, the commissioners may, on due proof made on oath of the amount of such sums refunded, and that by reason thereof there hath been an over-payment of duty, repay the over-payment for the duty.

Sect. 35. That whenever an executor or administrator shall be entitled to any legacy, or residue, such person shall be chargeable with the duty when he shall be entitled, in the course of administration, to retain it; and every such person, before any such retainer, shall transmit to the commissioners a note containing the particulars of such legacy, or residue, intended to be retained, and the amount or value thereof; and the duty which such person shall offer to pay thereon; and the commissioners shall charge the duty thereon, and such duty shall be paid; and on payment of the said duty, the officer appointed to receive the same, shall, at the foot of a duplicate of the assessment duly stamped, give a receipt for such duty, which receipt shall be a discharge for the duty; and in case any such person shall neglect to pay such duty within fourteen days after the same ought to have been paid, every such person shall forfeit treble the value of the duty.

Sect. 37. That if probate or grant of administration shall be void, or be repealed, and such person shall, before the repeal, have paid any duty which shall not be allowed to such person, by reason that the same was not really due or payable, the money paid for such duty shall be repaid by the commissioners; but in case such duty ought to have been paid by the rightful executor or administrator, then the payment shall be valid; and such payments shall be allowed in account, and the same shall be deemed payments in the due course of administration.

Sect. 38. That if any person shall wilfully and corruptly swear, affirm, or alledge any matter which shall be false or untrue, with intent to defraud His Majesty of any of the said duties hereby imposed, every such person shall be liable to the pains and penalties of perjury.

Sect. 39. That if any person shall alter any assessment or receipt after the same shall have been signed by the officer, or shall utter or publish as true any such altered assessment or receipt, with intent to defraud His Majesty, then every person so altering, uttering, or publishing, shall forfeit the sum of 500*l*.

Sect. 40. That persons counterfeiting the said stamps shall suffer death as in cases of felony, without benefit of clergy.

Sect. 43. That one moiety of all penalties and forfeitures, where no other mode of prosecution is specially prescribed, shall, if sued for within three calendar months from the time of any such penalty or forfeiture being incurred, be to His Majesty; and the other moiety, with full costs of suit, to the person who shall inform or sue for the same within the time aforesaid, and which may be sued for in His Majesty's court of exchequer at Westminster, for offences committed in England, or in His Majesty's court of exchequer in Scotland, for offences committed in Scotland: but it shall be lawful for His Majesty's attorney general in England, or His Majesty's advocate in Scotland, to stop all further proceedings, by entering a *noli prosequi*.

Sect. 44. That in default of prosecution within the time before limited, no such penalty or forfeiture shall be afterwards recoverable, except in the name of the attorney general in England, and of the advocate in Scotland, by information in the court of exchequer in England or Scotland respectively.

Sect. 47. That all actions or suits shall be commenced within six calendar months after the fact committed, and not afterwards.

By the stat. 45 Geo. 3. c. 28. s. 2. it is enacted, that the duties granted by this act shall not extend to or be charged or payable in respect of any legacies satisfied out of any real or personal estate, or in respect of any residue or share of any personal estate, or of any monies or residues, or parts or shares of monies arising from the sale of any real estate of any person dying before the passing of this act.

Sect. 3. That nothing herein contained shall extend to charge with any of the duties hereby granted any legacy or

residue, or part or share of residue, which shall be given or pass to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the Royal Family.

Sect. 4. That every gift by any will or testamentary instrument of any person dying after the passing of this act, which, by virtue of any such will or testamentary instrument, shall have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of, as he or she shall think fit, or which shall have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy within the true intent and meaning of this act: provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this act granted, any specific sum of money, or any share or proportion thereof charged by any marriage settlement or deed upon any real estate, in any case in which any such specific sum or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument under any power given for that purpose by any such marriage settlement or deed.

Sect. 5. That the duties hereby granted upon legacies, or charged upon or made payable out of any real estate; or out of any monies to arise by the sale of any real estate, or upon residues, or parts or shares of residues of any such monies, shall be accounted for, answered, and paid by the trustees to whom the real estate shall be devised, out of which the legacy or share of any money arising out of the sale or mortgage or other disposition of such real estate, shall be to be paid or satisfied, or if there shall be no trustees, then by the person entitled to such real estate, subject to any such legacy, or by the person empowered or required to pay or satisfy any such legacy; and the said duties shall be retained by the person paying or satisfying any such legacy or share of money, in like manner, and according to such rules and regulations, and under and subject to such penalties, as far as the same can be made applicable, as are contained in stat. 36 Geo. 3. c. 52.

By stat. 48 Geo. 3. c. 149. s. 35. it is enacted, that the probate of the will of any person deceased, or the letters of administration of the effects of any person deceased, here-

tofore granted, or to be hereafter granted, either before or upon, or after the 10th day of October, 1808, shall be deemed and taken to be valid and available by the executors or administrators of the deceased, for recovering, transferring or assigning any debt or debts, or other personal estate or effects, whereof or whereto the deceased was possessed or entitled, either wholly or partially, as a trustee; notwithstanding the amount or value of such debt or debts, or other personal estate or effects, or the amount or value of so much thereof, or such interest therein, as was trust property in the deceased (as the case may be) shall not be included in the amount or value of the estate, in respect of which the stamp duty was paid on such probate or letters of administration.

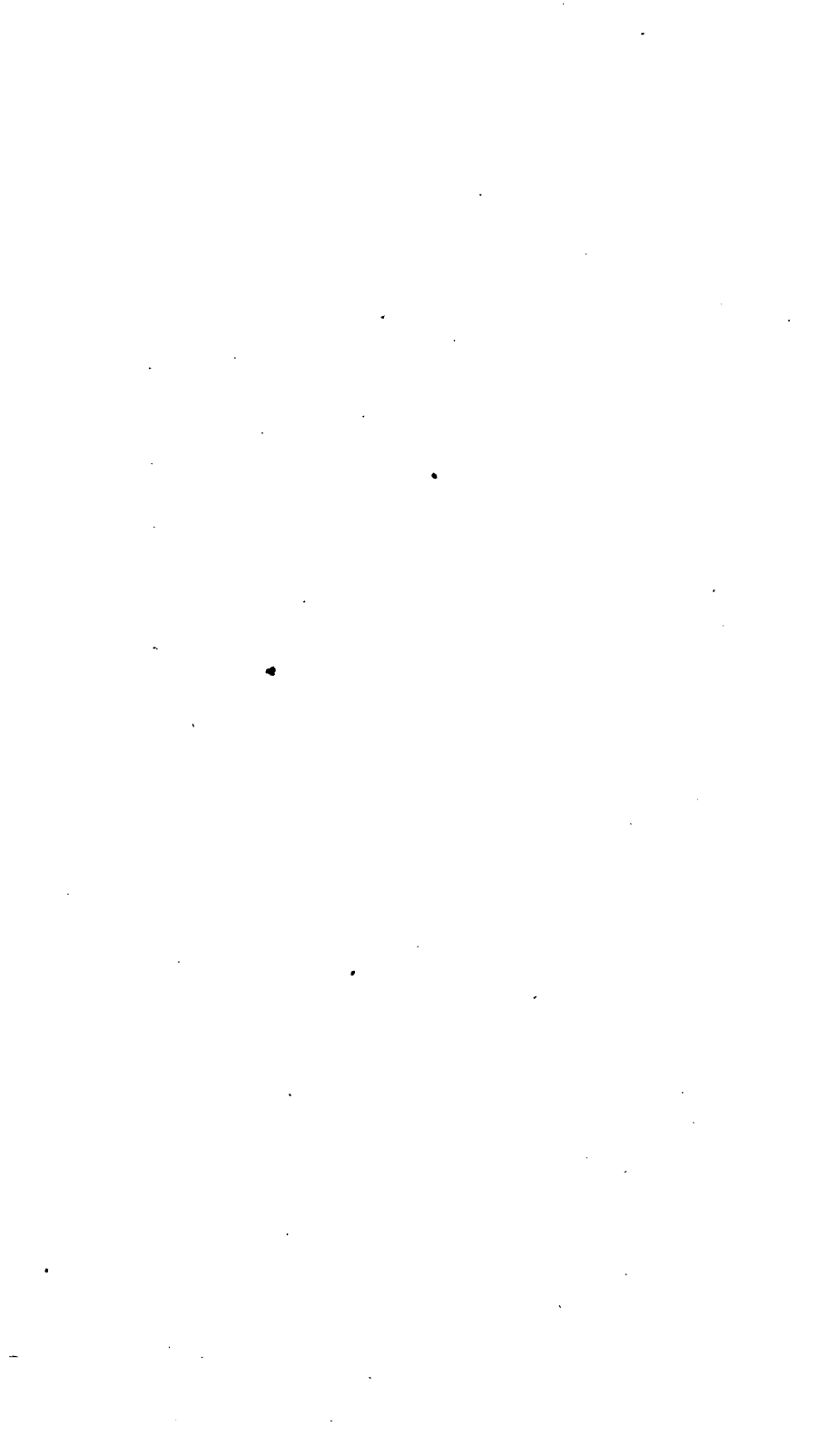
Sect. 36. That where the executors or administrators of any person deceased shall be desirous of transferring or of receiving the dividends of any share, standing in the name of the deceased, of and in any of the government or parliamentary stocks or funds, transferrable at the bank of England, or of and in the stock and funds of the governor and company of the bank of England, or of and in the stock and funds of any other company, corporation, or society whatsoever, passing by transfer in the books of such company, corporation, or society, under and by virtue of any such probate or letters of administration as aforesaid, and shall alledge that the deceased was possessed thereof, or entitled thereto, either wholly or partially, as a trustee, it shall be lawful for the said governor and company of the bank of England, and for any such other company, corporation, or society as aforesaid, or their respective officers, for their indemnity and protection, to require such affidavit or affirmation of the fact, as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to permit such executors or administrators to transfer the stock or fund in question, or receive the dividends thereof, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the letters of administration of his or her effects: and where the executors or administrators of any person deceased shall have occasion to recover any debt or debts, or other personal effects, due or apparently belonging to the deceased, and shall alledge that the deceased was possessed thereof or entitled thereto, either wholly or partially, as a trustee, it shall be lawful for the person or persons liable to pay or deliver such debt or debts or other effects, to require such affidavit or affirmation of the fact as hereinafter is mentioned,

if the fact shall not otherwise satisfactorily appear; and thereupon to pay, deliver, or make over the debt or debts, or other effects in question, to such executors or administrators, or as they shall direct, without regard to the amount of the stamp duty on the probate of the will of the deceased, or the letters of administration of his or her effects: and where the executors or administrators of any person deceased shall have occasion to assign or transfer any debt or debts due to the deceased, or any chattels real, or other personal effects, whereof or whereto the deceased was possessed or entitled, and shall alledge that the same respectively was or were due to or vested in the deceased, either wholly or partially as a trustee, it shall be lawful for the person or persons, to whom or for whose use such debt or debts, chattels real, or other personal effects, shall be proposed to be assigned or transferred, to require such affidavit or affirmation of the fact as hereinafter is mentioned, if the fact shall not otherwise satisfactorily appear; and thereupon to accept the proposed assignment or transfer, without regard to the amount of the stamp duty on the probate of the will of the deceased or the letters of administration of his or her effects.

Sect. 37. That upon any such requisition as aforesaid, the executor or administrator of the deceased, or some other person or persons, to whom the facts shall be known, shall make a special affidavit or affirmation of the facts and circumstances of the case, stating the property in question, and that the deceased had not any beneficial interest whatever in the same, or no other beneficial interest therein than shall be particularly mentioned and set forth (as the case may be), but was possessed thereof or entitled thereto, either wholly or in part (as the case may be) in trust for some other person or persons, whose name or names, or other sufficient description, shall be specified in such affidavit or affirmation, or for such purposes as shall be specified therein; and that the beneficial interest of the deceased, if any in the property in question, doth not exceed a certain value to be therein also specified, according to the best estimate that can be made thereof, if reversionary or contingent; and that the amount or value of the estate, for which the stamp duty was paid on the probate of the will of the deceased, or on the letters of administration of his or her effects, is sufficient to include and cover such beneficial interest of the deceased, as well as the rest of the personal estate, whereof or whereto the deceased was beneficially possessed or entitled, and for which such probate or letters of administration shall have

APPENDIX.

been granted, as far as the same have come to the knowledge of such executor or administrator; and where the affidavit or affirmation of the facts and circumstances of the trusts shall be made by any other person than the executor or administrator of the deceased, such executor or administrator shall make affidavit or affirmation, that the same are true, to the best of his, her, or their knowledge, and that the property in question is intended to be applied and disposed of accordingly; which affidavits or affirmations shall be sworn or made before a master in chancery, ordinary, or extraordinary, and shall be delivered to the party or parties requiring the same, and shall be sufficient to indemnify and protect the party or parties acting upon the faith thereof; and if any person or persons, making any such affidavit or affirmation as aforesaid, shall knowingly and wilfully make a false oath or affirmation, of or concerning any of the matters to be therein specified and set forth, every person so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties, as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to.



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